Cambridge University Press et al v. Patton et al
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CAMBRIDGE UNIVERSITY PRESS, et al.,
Plaintiffs,
CIVIL ACTION FILE
vs.
NO. 1:08-CV-1425-ODE
MARK P. BECKER, in his official capacity as Georgia State University President, et al.,

Defendants.

Videotaped deposition of NANCY SEAMANS, taken on behalf of the Plaintiffs pursuant to Rules 26 and 30 of the Federal Rules of Civil Procedure, before Michelle M. Boudreaux, Georgia Certified Court Reporter, at the Offices of Legal Affairs for Georgia State University, 10 Park Place South Building, Atlanta, Georgia, on the 10th day of March 2009, commencing at the hour of 10:15 a.m.

SHUGART & BISHOP
Certified Court Reporters
13 Corporate Square
Suite 140
Atlanta, Georgia 30329
(770) 955-5252

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APPEARANCES OF COUNSEL

On behalf of the Plaintiffs:
R. BRUCE RICH, Esq.
HARRIS COHEN, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8000

EDWARD B. KRUGMAN, Esq.
JOHN H. RAINS IV, Esq.
Bondurant, Mixson & Elmore, LLP
1201 West Peachtree Street, N.W.
Suite 3900 One Atlantic Center
Atlanta, Georgia 30309-3417
(404) 881-4106

On behalf of the Defendants:
STEPHEN M. SCHAETZEL, Esq.
KRISTEN A. SWIFT, Esq.
King & Spalding LLP
1180 Peachtree Street, N.E.
Atlanta, Georgia 30309-3521
(404) 572-4600

Also Present: Mary Jo Volkert
Cynthia Hall

Videographer: Kennith Drake

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(Whereupon, disclosure as required by the Georgia Board of Court Reporting was made by the court reporter, a written copy of which is attached hereto.)

THE VIDEOGRAPHER: This will be the videotaped deposition of Nancy Seamans taken by the plaintiffs in the matter of Cambridge University Press, et al. versus Mark P. Becker in his official capacity as Georgia State University president, et al.

The date is March the 10th, 2009. We are on the record at 10:15:07.

NANCY SEAMANS,

being first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. RICH:

Q Good morning, Ms. Seamans.
A Good morning.
Q My name is Bruce Rich. I'm a partner with the law firm of Weil, Gotshal & Manges, and I will be asking you some questions today.
First, would you state your name and address for the record, please?
A Nancy Seamans, Georgia State University, University Library, Atlanta, Georgia.
Q And have you ever had your deposition taken before?
A No.

Q Okay. If there's any aspect of this process that you don't understand, most particularly the questions I'm asking you, you can certainly feel free to seek a clarification. Of course, your counsel will keep me straight and narrow during the day today.

By whom are you employed, Ms. Seamans?

A Georgia State University.

Q And what is your position?

A I'm the dean of libraries.

MR. SCHAETZEL: Bruce, then, consistent with my obligation to keep us on the straight and narrow, first of all, the witness would prefer to read and sign, so I'd like to get that on the record.

And also, as I believe was done in Mr. Potter -- or Dr. Potter's deposition, we do intend to try and preserve the privilege and will from time to time raise that as appropriate.

MR. RICH: Okay.

MR. SCHAETZEL: Okay.

Q (By Mr. Rich) And when did you your assume your duties as -- is it dean of libraries?

A Yes. August 4th, 2008.

Q Congratulations on your new position.
A Thank you.
Q Prior to that tame, I take it you were at the University of Iowa for a period of time?
A I was.
Q What was your last position at the University of Iowa?
A Associate university librarian for research and instructional services.
Q And approximately for what period of time did you hold that position?
A Three and a half years.
Q And your educational degrees are what?
A I have an undergraduate degree in political science from Virginia Tech. I have a master's degree in library and information science from UNC Chapel Hill, and I have a Ph.D. in instructional technology from Virginia Tech.
Q All right. At a general level, could you describe the duties you had as -- in your last position at the University of Iowa, please?
A Generally, I was responsible for services provided by the library to the constituent group, which is primarily (unintelligible).
Q And what is encompassed by the term

"services provided" to that constituent group?

A It was branch libraries, reference, media services, access services, interlibrary loan.

Q Did the university -- what were the various techniques by which course materials were read by students at the University of Iowa? How did they access such materials? What were the span of options?

A The ones that occur to me are accessing materials by purchasing them, by checking them out of the library, by using them on reserve, by using them on electronic reserve, by using them via materials handed out in a classroom setting. There are probably others, but that's what is coming to me quickly.

Q And by what techniques did students purchase -- typically purchase materials?

A Through the bookstore.

Q And did those purchases -- are you familiar with a concept called "coursepacks"?

A I am.

Q What do you understand that term to mean?

A Generally to be materials that a faculty member has determined are critical for instructional purposes and has arranged to have copied and permissions received and sold to students.

Q Was such a practice engaged in by faculty at the University of Iowa?

A I don't know for sure, but I'm assuming so.

Q Did any aspect of what you describe as coursepacks fall within your jurisdiction?

A No.

Q At any time in your tenure at the University of Iowa?

A No.

Q Did your responsibilities while at the University of Iowa encompass reserve and E-Reserve usage of materials?

A Yes.

Q What level of role, involvement, or supervision did you have with respect to reserve and E-Reserve usage?

A I had a department head who reported to me, and that person was responsible for all of access services, which included circulation, interlibrary loan, reserve, E-Reserve.

Q And in relation to E-Reserve practice at the University of Iowa, did you have occasion to become familiar with the variety of course offerings that were scanned, I assume, and made available for

student access by the E-Reserve system?
A Only generally.
Q What was your general understanding of the nature of such uses of course materials?
A That faculty member determined whether or not supplemental materials were appropriate for the instructional setting and would make a request to have them available for their students.
Q You used the term "supplementary." Was it the practice at the University of Iowa that faculty members would only use E-Reserves for the purpose of supplementing otherwise required course readings?
A Generally, yes.
Q And in your experience, what volume of materials would be placed on E-Reserve? What's the range of volume that you experienced from low to high?
A I'm sorry, I really don't know.
Q Okay. Were you shown any statistics or received any reports about that sort of practice?
A I probably was, but I don't recall what the numbers were.
Q Okay. Now, would you generally describe your duties and supervisory responsibilities in your present position as dean of libraries at Georgia

State University?

A I am responsible for all functioning of the university library, not to include the law library. I am not responsible for that. That includes personnel, budget, collections, development. Those are probably the key pieces.

Q And --

A Services, instruction, outreach.

Q Pardon me.

A Services, instruction, outreach. Give me time, and I'll keep going.

Q I certainly want you to respond completely.

To the extent that faculty and students utilized one or both of reserve and E-Reserve forms of access to course materials, what degree of involvement in those practices does your position entail?

A Very little.

Q Any at all?

A I am aware of what is going on with that, but there is a unit head, a department head, an associate university library, and then me, so it's several layers removed.

Q Can you identify each of those in that pyramid that you've described, please, by name and title?

A   Denita Hampton is the head of access services, and the associate university librarian is Laura Burtle.

Q   I'm sorry. Ms. Burtle's title is?

A   Associate university librarian.

Q   To the extent that from time to time Georgia State University policies, with respect to usage of copyrighted materials by faculty or students, comes under scrutiny --

A   Uh-huh.

Q   -- what is your -- by the nature of your position, what is your role and responsibility with respect to the formation, shaping, and promulgation of such policies?

A   Policies --

MR. SCHAETZEL: Objection as to form.

Go ahead.

THE WITNESS: Okay.

Q   (By Mr. Rich) Do you have the question?

MR. SCHAETZEL: You can answer.

THE WITNESS: The policies in terms of just reserves?

MR. RICH: No, copyright --

THE WITNESS: Copyright --

MR. RICH: -- compliance generally.
THE WITNESS: That has very little to do with the library because the policy does not come from the library.
Q (By Mr. Rich) To the extent that Georgia State University at any point in time wishes to implement policy, for example, Regent policy --
A Uh-huh.
Q -- and to take steps to provide both technological and other means for faculty and students to work within those policies --
A Uh-huh.
Q -- again, what is your role and supervisory responsibility with respect to implementation of those policies?
A For the university?
Q Yes.
A We certainly do take policies that the university has and abide by them, so we are implementing policies that the university has in place and we are trying to work within those.
Q And you use the collective "we." For the moment, I'm trying to isolate out a bit your own personal --
A Okay.

Q -- role and responsibility in relation to implementation of copyright compliance policy.
A It would -- I'm very peripherally involved in that implementation.
Q And with respect to Ms. Burtle, is it --
A Uh-huh.
Q -- how would you describe the extent of her involvement in such matters, that is, implementation of policy?
A Probably slightly more than mine, but the policy comes from the university or from the Board of Regents, so it's how we go about implementing what they have given us. So she would be more involved than I would be, Ms. Hampton would be more involved than she would be, but most of it is trying to figure out, within the constraints of what the policy is that we have been given, how we make it work best.
Q What is the -- what is Ms. Hampton's background in terms of training; do you know?
A I don't.
Q Do you know if she has any special training in intellectual property matters?
A I do not.
Q And copyright matters in particular?
A I do not.

Q Same question with respect to Ms. Burtle.
A I do not.
Q To your knowledge, is either of them formally trained in law?
A No, not to my knowledge.
Q And I take it you do not have formal training in law?
A I do not.
Q How would you describe your knowledge of copyrights?
A On-the-job training.
Q Consisting of?
A Being in libraries and academic libraries for a number of years and seeing the evolution of reserve systems going from a paper-based system to an electronic system and trying to make sure that that transition is a smooth one, understanding what the copyright law is to the best of my ability as a nonlawyer.
Q What tools have you used to try to understand, as a nonlawyer, what copyright law is all about?
A Mostly reading.
Q For instance, any particular reading materials or types of materials come to mind?

A There are a number of books on copyright law for librarians.

Q And --

A Increasingly, Web sites also provide material.

Q Since joining Georgia State University this past August --

A Uh-huh.

Q -- have you had occasion to utilize, for purposes of reference or further education, any formal materials relating to copyright law?

A "Formal" being --

Q Published materials.

A -- books, Web sites? Probably more Web sites than books.

Q All right. The answer --

A Yes.

Q -- is yes?

A Yes.

Q And which would those have been?

A Certainly the Columbia University Web site, the University of Minnesota Web site, Cornell University, the University of Washington. I'm sure there are others, but those are the ones that occur to me.

Q Were there particular reasons that you came to visit at least the four sites you identified?
A Uh-huh. As part of the Regent Select Committee on Copyright, we were given -- suggested that we look at a number of pages to review.
Q And was Cornell among those?
A Yes, I believe it was.
Q Did those suggestions come from counsel?
MR. SCHAETZEL: Objection. You're asking for privileged information and communication from counsel. Can you rephrase the question?
Q (By Mr. Rich) Where did these suggestions come from?
A From the chair -- chair of the committee.
Q Okay. In your -- and you have some working familiarity with the so-called fair use doctrine of copyright, correct?
A I'm familiar with fair use doctrine, yes.
Q In the course of your career, not limited now to Georgia State University, have you had occasion to think about applications of the fair use doctrine to day-to-day practice in the university setting?
A Certainly from a library perspective, yes.

Q Yes. And does that include during your tenure at Georgia State University?
A Generally, yes.
Q Okay. And what kinds of settings would come up where you would draw upon that learning and that set of understandings?
A Mostly in terms of how it might be implemented within a library.
Q Okay. And I take it you're aware that one of the elements generally considered in connection with the fair use doctrine is -- involves the amount of a particular work that may be excerpted, either as a percentage of the whole work or in some fashion? That's a concept you're familiar with, yes?
A Yes.
Q Have you developed any working understandings as to whether there is a threshold, sort of safe harbor --
A Uh-huh.
Q -- percentage of a work which, if a faculty member were to utilize, would insulate that use from any claim of copyright infringement?
A No.
Q Do you have any understanding as to whether there is any numerical percentage which acts as a

litmus test for determining the safe amount of a work which may be taken?

A It seems to me it would be very hard to have a numerical amount because each situation is different. So you would have to look at the given circumstances to determine that.

Q Another element of the fair use doctrine, I'm sure you know, sometimes called Factor 4, involves effect on the market for the work which has been taken. That's a concept you've heard before, yes?

A Yes.

Q Do you have a general sense for the dynamic of that? Again, as a layperson, what's your sense of how one should think about properly, in the fair use analysis, that aspect of the fair use test?

A It would be a component, my understanding, not as a lawyer --

Q Yes.

A -- that if there is an impact on the sale that would limit the sale or would keep the holder of copyright from having recompense for the use of that material, that that would be a factor to consider.

Q Have you considered the concept not simply of potential lost sale, but of a lost license or a lost licensing income stream for that rights holder as part of that?

A Licensing and sale I would be thinking of in a similar way.

Q Okay.

A Yes.

Q And again, from your study, thinking, analysis, and reading, have you come to the view that one or more of the so-called fair use factors has more importance in the balance than any others?

A No. They're all important, all four of them.

Q What is your view of the ability of someone who has not studied, as you have, much of the literature on fair use and related -- what's your view of the ability of such an individual to perform a meaningful fair use analysis in a given setting?

A I believe that by providing any individual with a tool like the checklist, you are giving a reasonable person the opportunity to reasonably do that determination, that that makes them think about all of those four fair use factors and the components of the fair use factors. So I believe a reasonable person could use that tool and make a determination.

Q Do you have a view whether for that process to function reasonably, there is also required any additional context, background setting, or other information?

A Absolutely.

Q And what does that include?

A It would be that the faculty member has to know what they are doing within the teaching setting.

Q And can you explain a little more what you mean by that?

A The person who can best determine whether a use is a fair use is the faculty who is teaching the class and is looking at material and trying to determine whether or not their use would be a fair use. They're the ones that know the course, they know what they're teaching, they know the points they're trying to make. And so they're best equipped to make that determination, so it would have to be in the context of a faculty member and a course.

Q Do you believe it to be of any importance that faculty, say at Georgia State University, who will be required, as I understand it, to apply the new fair use checklist, take some courses or attend some seminars in which more background about context for copyright law and fair use doctrine is spoken about?

A Yes.
Q Are you involved in any fashion? Do your responsibilities involve you, as part of the implementation of the new Regent policy, in fashioning such educational tools?
A I have seen the training and I've seen the educational tools, but I was not involved in creating them.
Q And when you say you've seen the training, what specifically are you referencing?
A I attended a training session.
Q And when was that?
A Ten days ago, two weeks ago, three weeks ago. The policy was approved by the chancellor on February something, 19th, 17th. And the training we put into place from legal counsel at the university took place with the library staff within the next 10 days after that.
Q And can you describe --
A Sometime before the end of February.
Q Can you describe the format of that training session?
A It was a presentation by one of the attorneys with a PowerPoint that had material about the new policy and implementation. And my

understanding is that that similar training would be made available for faculty members.

Q This particular one was for members of the library staff, did you say?

A Yes.

Q Approximately how many people attended?

A Ten.

Q And was that mandatory attendance --

A Yes.

Q -- the list of who was there?

A Yes.

Q And about how long did the presentation last?

A It was scheduled for an hour and ran over two.

Q Was there a Q&A --

A Yes.

Q -- portion of it as well?

A Yes.

Q And was that presentation made by Ms. Hall?

A Yes.

Q I'm going to show you a document we'll mark as --

MR. RICH: What's the next number?

(Discussion off the record.)

(Exhibit 17 marked for identification.)
Q (By Mr. Rich) Plaintiff's 17, a document bearing production Bates Nos. 21120 to 21148 titled "Copyright in Instruction & the New USG Copyright Policy," apparently authored by Cynthia V. Hall, Office of Legal Affairs, Georgia State University, dated January 23, 2009.
Do you recognize this to be the PowerPoint presentation you were just referring to?
A Without recalling --
Q Appear -- does this appear to be?
A This appears to be, yes.
Q Okay. Did you have any input in the creation of this document?
A No.
Q You first were exposed to it when it was presented?
A Yes.
Q Okay. Do you have any knowledge how this document came to be prepared, other than what appears to be obvious, that Ms. Hall had a significant hand in its preparation?
A And that much of it is from the new policy.
Q Any other understanding about how this --
A No.

Q -- was composed?
Did you ever have occasion to see any prior iterations of this PowerPoint or drafts of it?
A No.
Q If you would turn to the page Bates-numbered 21128, please. It indicates that -- I take it the broad reference to "USG Copyright Policy" is to the newly promulgated policy coming out of the committee work of which you were a part?
A Yes.
Q Okay. And the first bullet here by Ms. Hall indicates, "Inform and educate students, faculty, and staff on copyright."
A Uh-huh.
Q What did you understand that to say and what is your recollection of how Ms. Hall described that activity?
A That there would be a training opportunity for all faculty as part of the implementation of the policy.
Q And do you have an understanding whether that's an optional training for faculty, whether it's mandatory for some or all faculty?
A I do not know.
Q And the next bullet says, "Tools to assist

in copyright and fair use analysis (see fair use checklist)."

A Uh-huh.

Q Did you understand this or did Ms. Hall describe this as involving tools beyond resort to the fair use checklist?

A I believe the sense was that the Web site that is currently up includes additional information that faculty particularly could use in determining what fair use is and what materials might be covered by fair use, what you might not need permission for, that kind of thing. So the one specific tool is the checklist, but I think we see -- we heard that the entire Web site was a -- was, in a way, a tool.

Q And do you have any understanding on that subject, whether the preexisting Regents Guide --

A Uh-huh.

Q -- dating back to 1997 is intended to be a tool continuing to be available as a resource for people trying to understand copyright law within the University System?

A No.

Q No, you don't? No meaning --

A No, I do not think it is intended as a tool.

Q It's to be discontinued as a resource?

A It is a historical document, which I hope will be preserved, but I do not feel that it is intended to be used as a tool.

Q And what is your understanding as to the reason that it is being relegated to a historical document?

A Because there is a new policy in place.

Q And do you view the new policy as modifying, in one or more particulars, the guidance that was provided by the prior Regent Guide?

A Yes.

Q And in what particulars would you describe the new policy as diverging from the old?

A The first piece that to me is most interesting is that the former -- the Regents Guide was a guide, and what we now have is a policy. My sense is that a guide makes suggestions to people about how they might proceed, and a policy mandates that they must proceed in a certain way.

Q So --

A So I think they're --

Q I'm sorry, go ahead.

A I think they're very, very different in terms of implementation.

Q Could we explore that just for a couple of minutes so I understand your conception of that?
A Uh-huh.
Q What did you -- so I take it your understanding of the preceding guide was to give, for lack of a better word, guidance?
A Uh-huh.
Q But when you say it wasn't -- it wasn't mandated to be followed, is that your perspective?
A (Witness nods head affirmatively.)
Q And by that, you mean by each of the 35 institutions within the University System?
A There's a difference between a policy and a guide. I mean, a guide is something that is a general understanding, something that provides, as you said, guidance. And a policy is, "Here is our policy and you will follow it." And this may be a peculiarity of academia, but there's a very distinct difference between a policy and a guide.
Q Okay. I interrupted you in sort of listing --
A Uh-huh.
Q -- changes that you thought were salient. Please continue.
A That with a policy, there is language in

that policy of what faculty must do. And with certain constraints provided, I think if you look at the policy, it tells people how to act, in a way.

Q In terms of substantive advice in terms of applying copyright and fair use principles --

A Uh-huh.

Q -- to particular applications, did you come to be of the view that the new superseding policy diverges in one or more particulars from the advice contained in the prior Regent Guide?

A I am not familiar enough with the prior guide to comment on that.

Q Did you have any occasion during the deliberations of the recent committee to look at draft materials, which I believe may have been circulated to the entire committee, in which some of the so-called scenarios which were contained in the 1997 Regent Guide were republished for the committee's consideration, and in certain cases, I'll represent to you, certain modifications were made in the proposed analysis of the circumstances presented? Do you recall being exposed to that material?

A Yes.

Q And were you part of any committee discussions concerning those scenarios?

A The discussion was that they were too tied to the former guide and that they would just be confusing to people if we included them in the new policy. So we didn't look at them closely.

Q And what was the opportunity for confusion?

A That they were two separate documents, and that by pulling pieces from one document into another one, it would just confuse users, and that we should leave one as a historical document and not try to modify it.

Q Was there any consideration given to supplementing the current policy with those kinds of examples?

MR. SCHAETZEL: Objection as to form. Can you answer that without divulging any attorney-client communication that --

MR. RICH: Yes, I don't want you to. Thank you.

MR. SCHAETZEL: If you can -- and we can have the question read back so that you can hear it again, then we'll be pleased to answer it. Otherwise, I need to know if you would have to divulge communications at the hearing --

THE WITNESS: Can I hear the

question --

MR. SCHAETZEL: -- or at the committee meeting, excuse me.

(Record read.)

MR. RICH: Let me add whether the committee received legal advice as to the advisability of doing that or not, but rather, separate from that, there was any consideration to the advisability of incorporating those kinds of examples in the final policy.

MR. SCHAETZEL: Before you answer, I'd like for her to be able to answer the question. And I appreciate the distinction that you're trying to draw. What I would ask is, are we in agreement that by answering this question, we will have --

MR. RICH: Yes.

MR. SCHAETZEL: -- not acted --

MR. RICH: Yes.

MR. SCHAETZEL: -- in any way to waive the privilege --

MR. RICH: Yes.

MR. SCHAETZEL: -- so that -- okay. You might want to have the question read

back again after all this, but just --
let's try and answer it as best we can.
(Record read.)
THE WITNESS: Yes.
Q (By Mr. Rich) And what was the nature of the discussion of it?
A One of the Web sites that we reviewed -- and I'm sorry, I can't remember which institution -- had provided some examples, and there was discussion of whether or not that was a good model to follow. The decision was made not to.
Q Did you have a point of view?
A No.
Q And the gist of the reasoning carried today as to not including it was -- apart from any legal input was what?
MR. SCHAETZEL: Objection. I'm not sure that those two can be separated out --
MR. RICH: If they can.
MR. SCHAETZEL: -- that easily.
MR. RICH: If they can.
MR. SCHAETZEL: And objection, asked and answered, but go ahead.
THE WITNESS: Can I have the question again? I'm sorry.

(Record read.)

THE WITNESS: I don't have a sense of which way it went, no.

Q (By Mr. Rich) My -- several questions back, my sort of topic sentence question or topic paragraph question was, did you perceive there to be changes implemented in the policy or differences from the preexisting guide? You answered yes, and I had asked you to start listing them, and one was -- one was a guide --

A Uh-huh.

Q -- and one was a policy, yes?

A Uh-huh.

Q And I didn't mean to interrupt your list if there are other changes that you felt were important to point out.

A And again, I am not familiar enough with the original guide to make comparisons.

Q Are there any other things that come to mind that you think are salient distinctions substantively or procedurally from the prior guide?

A Not that I'm thinking of right now.

Q The third bullet on the page 21128 of Exhibit 17 says, "Facilitates use of materials currently licensed and provide information on licensing."

What is your understanding and recollection as to what that is a reference to?

A The library does -- excuse me, does have licensed material, and we would be involved in trying to make sure that faculty are aware of what we have licensed and what they can use without having to make any kind of fair use determination.

Q So if I understand your answer, the policy contemplates first checking to see whether there exists license arrangements with respect to the materials proposed to be used; if so, that obviates a fair use analysis as to such materials, is that correct?

A Yes.

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) The last bullet is, "Individuals to counsel faculty and staff (Office of Legal Affairs, others)." What is your understanding of the meaning of that?

A That should faculty and staff have questions, they have a resource in the Office of Legal Affairs.

Q And were individuals identified as being that resource?

A Specifically Cynthia, because she was doing the training session, but the sense that there were other people in the Office of Legal Affairs who were available also.

Q And was there discussion around that concept, either in terms of the presentation made by Ms. Hall or any Q&A about the situations that it might be expected that questions would occur and the frequency with which it was expected that faculty might invoke the availability of legal counsel?

A Not specifically, no.

Q Turning the page, please, to the next page, 21129. This PowerPoint is headed "USG Guidelines on Electronic Reserves." The first bullet reads, "Instructors evaluate whether permissions needed or fair use -- know details of work and use."

I take it that denotes the policy/procedure requiring instructors to go through the fair use checklist with respect to each otherwise unlicensed work which they propose to use on E-Reserve; is that correct?

A That's my understanding.

Q And do you have any understanding of what checks and balances, if any, are built into the system to make judgments about the reasonableness of the determinations that individual instructors would be making?

A I'm not sure I'm following your question.

Q Is it your understanding that the policy contemplates any form of supervision, auditing, sampling, review, or the like of the individual determinations that will be made by faculty members to determine the reasonableness of those determinations?

A I'm not aware of any.

Q And specifically in relation to Georgia State University, are you aware of any plans or processes either now in place or to be put in place to serve that function?

A If there is anything that I would see going forward -- and this is -- because this is new to us, we're still figuring this out, from the library perspective, that there would be a sense that staff, when in doubt, would question -- would take the issue to legal counsel, that there would be not an automatic acceptance of what a faculty member has said if there is something that raises a red flag for a faculty -- for a staff member in the library.

Q And when you reference staff members in this connection, what are we talking about, who are we talking about?

A We're talking about technicians, clerks, library clerks. So it would be something that would have to be pretty egregious to make them question something, but they are given the authority to raise questions if they see something that bothers them.

Q Was that communicated during this seminar?

A Yes.

Q Were any examples given of what might be viewed as egregious?

A It mostly focused on quantity, that if somebody asked that an entire book be scanned, for example, would the staff accept that, and we generally said probably not, that they would ask that legal counsel be involved.

Q Any other examples that came up of that kind of egregious --

A Not that I'm thinking of.

Q Turning to page 21130, the second bullet indicates, "Remove materials at the end of each semester." Do you see that?

A Yes.

Q Does the policy contemplate what's to be done if a professor wants to offer the same materials in one or more succeeding academic terms?

A I don't believe it explicitly addresses that, but for implementation purposes, they would have to resubmit the request --
Q You would --
A -- and do the --
Q Pardon me.
A -- and do the analysis.
Q And was that topic covered at this seminar?
A Yes.
Q What was said about it, just what you said?
A (Witness nods head affirmatively.)
Q Is there any presumption either favoring or disfavoring use in sequential semesters of the same material under the policy?
A It would have to be determined by the fair use analysis, so the faculty member would have to go through the same steps, so no presumption either way.
Q Turn to page 21146, "Copyright Myths."
A Uh-huh.
Q Did Ms. Hall cover this in her presentation?
A She did.
Q Second bullet says one of the myths is, "It is legal to copy as long as you don't copy the entirety (more than 25 percent, 20 percent, 10

percent, etc.) of the work."
Was there more conversation around this at the seminar, either in terms of how Ms. Hall presented this concept or from the feedback from the group?
A I believe there probably was. I'm not recalling specifically, but it's -- I'm guessing that -- as I'm thinking back, that there was more discussion of this, yes.
Q Can you recall any specifics about it?
A No, except that the idea that there is any percentage that you can attach and that makes it right or wrong was debunked as part of this discussion.
Q Was this lawsuit discussed during this presentation?
A Not that I recall.
Q Was any linkage between this lawsuit and the new policy discussed at this seminar?
A Not that I recall.
Q By the way, how did you prepare for today's deposition?
A I read the policy and I attended the session with Steve last Friday.
Q A preparation session?

A Preparation session.
Q And did you receive any kind of a briefing as to yesterday's deposition?
MR. SCHAETZEL: Objection as to form. That would be asking for communication between client --
MR. RICH: I'm only asking for yes or no.
MR. SCHAETZEL: Yeah, but that would -- no, it would go into -- whether or not any conversation occurred would go into whether or not we determined it substantial, or that would reflect our mental process in determining whether or not we thought it was substantial enough that we needed to talk with her about it.
Q (By Mr. Rich) In preparing for today, did you read any portion of yesterday's deposition transcript?
A No.
Q Okay.
MR. RICH: And you're suggesting that if I ask her if she was advised as to any of the questions or answers given yesterday, without identifying which ones,

you're not going to let her answer that?

MR. SCHAETZEL: I'm suggesting that that question asks for communications between client and counsel.

MR. RICH: No, I'm not asking her -- I would agree with you if I said, "What topics did your counsel go through with you yesterday that he or she thought was relevant to yesterday's session?" I wouldn't ask it because I wouldn't think it would be a proper question because that's privileged.

But I disagree that asking simply whether, as part of your preparation, you were advised as to certain of the questions propounded and certain of the answers given, without telling me which ones, at yesterday's deposition. That's all I'm asking. That calls for a yes or no.

MR. SCHAETZEL: The fact that it calls for a yes or no isn't determinative of the inquiry. Okay, I think I've heard now at least two -- what is your question? Put the question on the table so that I can determine an answer. What is your question, Bruce, and --

Q (By Mr. Rich) As part of the preparation for your deposition, were you advised as to certain of the questions I asked yesterday of Mr. Potter and certain of the answers he provided? I'm just asking for a yes or no.

MR. SCHAETZEL: And that question calls for the substance of the communication between the client and counsel. I don't see how I can allow her to answer that question.

MR. RICH: I completely disagree with that. I'm entitled to know how this witness's knowledge was either gained or refreshed or otherwise embellished by any access to anything, whether it's -- you know, if I show her a particular document, I think you would agree I can ask her if she was shown that document during her preparation. That would be completely acceptable, as opposed to tell me all the documents you reviewed to prepare for your deposition, that would not be proper.

But otherwise, it's just fundamental for the Federal Rules of Evidence that I'm entitled to know if she had her recollection refreshed in any way by, you know, information of that sort. That's just the fundamental, you know, basic rules of evidence.

MR. SCHAETZEL: I think I have a understanding of the rules of evidence, and we evidently have a disagreement about what is there. But in order to get us by this, if you'll agree that we're not waiving the privilege by having her answer this question, then I'll allow her to answer this one yes-or-no question and we'll take on -- we'll see what --

MR. RICH: No, I've indicated I wasn't going to ask beyond the yes or no in this.

Q (By Mr. Rich) So with that long colloquy...

A No, I was not told about specific questions that were asked, nor about specific answers that were given.

Q Thank you.

Are you familiar with an organization known as the Copyright Clearance Center?

A Yes.

Q How do you know about CCC?
A It has been around for years, and it is available to provide support for people trying to use copyrighted materials. And at some point in my career, I talked with them about using their services for a library that I was managing.
Q And when was that and where was that?
A It was in Roanoke, Virginia, and it was 20 years ago.
Q And do you remember the form of license you were exploring with CCC --
A No.
Q -- at that point in time?
A No.
Q And did it culminate in a license arrangement?
A No.
Q In that interim since that 20-year-ago exposure to CCC, have you had other interaction with CCC?
A No.
Q Do you have any idea the extent to which other library staff at Georgia State University have, say in the past two years, had interactions with CCC?
A Not explicitly, no.

Q Not explicitly?
A Right.
Q I don't -- is there an implicit answer that's lurking?
A Probably so. My understanding is that CCC was contacted about a license and declined to make any proposal.
Q What's the basis for your understanding?
A Hearing it from someone. And I'm sorry, I don't recall who it was that told me that.
Q Do you know any more detail than what you've described?
A No. And I don't have a time frame for the question, though I believe it was after the lawsuit had been filed.
Q Okay. We talked briefly earlier about coursepacks, and you identified your understanding of that and we chatted very briefly about the practice at the University of Iowa.
Have you gained an understanding of the extent to which coursepacks are a source of providing students with reading materials on the Georgia State University campus?
A I don't know details, but would assume that coursepacks are available for purchase when a faculty

member has created one.

Q What is your understanding about the process by which coursepacks are made available for student purchase on this campus?

A I don't know details about what is done, but would assume it's the same as on most campuses, which is the permission is received, the copies are made, they are taken to the bookstore, and they're sold.

Q And is it your understanding that that occurs through a university bookstore, as opposed to an off -- an off-campus copy shop, for example?

A I don't know.

Q Okay. Okay. And are those activities at all within your province?

A No.

Q Who supervises, if anyone, coursepack practice, as it were, at GSU?

A My understanding was that it was initially done by an employee of the instructional -- the campus IT unit. And whether that's still the case, I'm not sure.

Q Respecting the new policy we've been talking about off and on and we'll talk a lot more about --

A Uh-huh.

Q -- what is your understanding about the applicability of the guidance provided and indeed of the checklist --

A Uh-huh.

Q -- to the creation of coursepacks?

A There's no link. A coursepack is a -- is like a textbook that is created and sold, and so there's not a need to -- I mean, you must get copyright permission to make the copies and to sell them.

Q And why is it that you have that understanding that the copyright law would require that? Is it because what has been created is tantamount to a textbook?

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) You can answer.

A It's that it's required material for a class, as opposed to supplemental material, and students are required to purchase it for that course.

Q So -- just so I'm clear, if a professor takes 20 excerpts of copyrighted materials, a chapter from a particular work, a journal article from journal issues, assembles it physically --

A Uh-huh.
Q -- into a coursepack and it becomes the required reading for that course, that's it, and if I had one, you know, I'd stack it up here, okay --
A Uh-huh.
Q -- that's it, takes it to the university bookstore, your understanding is that university policy would require that professor to obtain permissions with respect to the constituent elements; is that correct?
A If it is going to be sold in the bookstore, yes.
Q Yes, and that's because, again -- and that's irrespective of the size of any of the individual components that together create this textbook, as you describe it?
MR. SCHAETZEL: Objection as to form.
THE WITNESS: Irrespective of the size.
MR. RICH: Yeah.
Q (By Mr. Rich) Do you have any idea -- has anyone, to your knowledge, maintained records of the permissions fees that are paid associated with the creation of these coursepacks on the GSU campus?
A I don't know.

Q Okay. Do you have any idea how the permissions process works with respect to those coursepacks?
A I don't know.
Q Do you know whether it is the assigned duty/obligation of the professor to secure the permissions, as opposed to via some unit of the university that facilitates acquiring permission?
A I don't know.
MR. RICH: Okay. Why don't we take a two- or three-minute break.
THE WITNESS: Okay.
MR. RICH: We need to change the tape.
THE VIDEOGRAPHER: Off the record at 11:10:58.
(Recess taken.)
THE VIDEOGRAPHER: This is Tape 2. We are back on the record at 11:20:58.
Q (By Mr. Rich) To the extent a faculty member, having gone through the new fair use checklist, were to make a determination that in order to use a particular copyrighted work, he or she would require permission, does your library have a budget to accommodate seeking such permission?
A No.

Q In that circumstance, where would the money come from for the faculty member to make the required permission payment?
A I don't know.
Q Is that something you've given any consideration to?
A Yes.
Q What has your thought been on that?
A I'm in the process of cutting a million dollars from my operating budget, and it's painful to have to do that; and at the same time, if we had faculty members who needed help to get permission, I would try to find the money to do that.
Q And are you --
A Financial support.
Q As part of your budgeting process, are you intending to earmark, however difficult it may be, some funds for that purpose specifically?
A Not specifically, no.
Q So you would just scratch and claw and try to find the money?
A That's what we're doing with everything else, yes.
Q Did the committee of which you were a member give consideration to this issue, namely the

financial impact of this or the funding aspect of this process insofar as the outcome might generate the need to secure permissions?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: Not that I'm recalling, though there was discussion of how different campuses would be reacting, responding to the policy.

Q (By Mr. Rich) And in particular, what was the nature of that discussion?

A Just that there would be different ways that each campus would have to address how to implement the policy.

Q Including --

A Not --

Q -- finding permissions --

A -- not explicitly financial, not explicitly financial.

Q I see. And did that issue, namely the -- where the money would come from to secure permissions, come up as part of Ms. Hall's late February presentation to the library staff?

A Not that I recall.

Q Have you done any estimates, formal or

informal, as to the amount that might reasonably be required during any academic term to cover permissions payments in respect of E-Reserve usage?
A No.
Q You have no sense of that at all?
A No.
Q What's your annual library budget?
A Eleven million.
Q Pre the million-dollar cut?
A Right.
Q And is there a fiscal year on which GSU operates?
A July 1 through June 30.
Q And what is -- to the extent you know these, and certainly estimates are fine, what's the size of the student body of GSU?
A 24,000 FTE.
Q Is that graduate and undergraduate?
A Yes.
Q Do you know the approximate breakdown between the two categories?
A No.
Q And do you have a sense of the size of the faculty?
A Around 1,200, I believe.

Q And are all of those full-time?
A I don't know.
Q Is it a practice on Georgia State University campus to have graduate students teaching courses or sections of courses from time to time?
A I assume so, yes.
Q And does Georgia State, to your knowledge, employ adjunct faculty from time to time?
A I assume so.
Q Other types of teaching assistance, are you aware of that?
A I don't know.
Q And again, at a general level -- strike that.
Are different undergraduate degrees conferred, or is there a single degree that every undergraduate student earns from Georgia State?
A I don't know.
Q Do you know any of the degrees that are offered, whether for everybody or for only some?
A I don't know.
Q Are there Ph.D. programs at Georgia State University?
A Yes.
Q And what disciplines do they span?

A Arts and sciences, business, public policy, health sciences, law school.

Q I take it from your earlier answer that the scope of your activities as dean of libraries encompasses collections and the like with respect to each of the degree programs and offerings you mentioned, other than the law school; is that correct?

A Yes.

Q Okay. Is that a matter of historic function, that the law school is carved out from the scope of responsibilities of the --

A I don't know.

Q -- dean of libraries?

Who is your analog, if there is one, with respect to the law school?

A There is a director of the law library.

Q Named?

A Nancy Johnson.

Q Could you describe the academic calendar at the Georgia State University? When do the terms begin and end, roughly, by month?

A Fall semester begins in August and ends in December, Spring semester begins in January and ends in late April, early May. There are -- there's a

Maymester that's a short-term summer session, and then there's a summer school.

Q And how long does the Maymester actually run?

A Three weeks, I believe.

Q Do you know that the -- the tuition that an in-state student pays today, undergraduate?

A I do not.

Q So I take it you don't know what an out-of-state student --

A No.

Q -- would pay today?

A More.

Q Of the $11 million library budget --

A Uh-huh.

Q -- is there a line item covering acquiring licenses to STM or other journal publications to the extent such licenses are available?

A To the -- so subscriptions?

Q Yes.

A Yes.

Q And as part of those subscriptions, to your knowledge, are licenses provided by at least certain publishers allowing various forms of digital or electronic usage or sharing of the journals?

A Yes.
Q And how prevalent are those licenses, say as -- either in absolute number terms or as a percentage of the subscriptions that you carry?
A I don't know.
Q Have you -- do you have personal involvement -- have you had personal involvement, since coming to Georgia State, in negotiating terms of any of those licenses?
A No.
Q Whose responsibility is that?
A The original -- the initial contract comes to the library, and it is then turned over to the Office of Legal Affairs to review.
Q Have you had involvement in those types of licensing transactions prior to coming to Georgia State?
A No.
Q Have you ever seen any of those licenses?
A Probably so, but I can't remember explicitly.
Q When did you first become aware of this lawsuit?
A April of 2008. And I'm going to guess it was April 17th, 18th, 19th, because it was whatever

morning the lawsuit was first made public.

Q How were you informed about it?

A I was talking to the provost on the phone about whether or not to accept the position here and he said, "We've been sued."

Q We've been -- he said, "We've been sued"?

A "You might want to look at the New York Times."

Q Did you have occasion to have subsequent discussions with the provost about the lawsuit?

A Very generally, yes.

Q Is this Mr. Henry?

A Yes.

Q And what was the general nature of those discussions at the time?

A Just that it happened and that he was not aware of what the circumstances were that had led to it and what he thought might happen in terms of how it would play out.

Q And what did he indicate he thought would happen as to how it might play out?

A That it would be resolved quickly.

Q Did he explain why he believed that?

A No. I think he was trying to hire me.

Q Did Mr. Henry indicate any form of

investigation that was going to be made concerning any of the allegations of the case?

A No.

Q Did you subsequently become aware of any investigations that were made about the allegations as to the copying practices that are cited in the complaint?

A No.

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) Did you ever have a chance to read either the original complaint or the amended complaint that was --

A Yes.

Q When did you do that?

A Sometime after April 18th, when it was made available online.

Q But prior to assuming your duties at Georgia State University?

A Yes.

Q Have you had any involvement in any aspect of the litigation, in relation to the defense of the litigation, since arriving at Georgia State, other than appearing today for your deposition?

A No.

Q Have you attended any meetings, other than

involving legal counsel, inside or outside, in which you and any colleagues have discussed the substance of the litigation?
A Yes.
Q Please describe any of those meetings.
A In almost any library community where people are aware that I am employed at Georgia State, the question of the lawsuit comes up.
Q And what do you tend to say when they ask you about the lawsuit?
A "I can't talk about it."
Q What is your understanding of the essence of the lawsuit? What's the essential complaint you understand of the publishers?
A That the Regents Guide -- the implementation of the Regents Guide at Georgia State University is in violation of copyright law.
Q Do you have any more specific understanding of the respects in which it's contended the copyright law is being violated?
A No.
Q Did you have occasion to consider -- from the examples cited in the complaint and in the exhibit to the complaint, did you have occasion to form a judgment, from your knowledge of copyright law

and your working with copyright law, as to the reasonableness of the contentions that the works cited exceeded fair use boundaries?

A No, because it seemed to hinge so much on the Regents Guide, which is -- seems to be different from the way many states have looked at how to implement copyright law.

Q I don't quite follow that answer.

MR. RICH: Can I hear the witness's answer back?

(Record read.)

Q (By Mr. Rich) Do I understand you to be saying that the proper way, as you think about it, to evaluate the claims of the complaint is to compare that practice against the Regent Guide, guidelines, to determine lawfulness, or am I misunderstanding your testimony?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: The Regents Guide is what people have used to implement the policy, so that's what you use to implement the policy.

Q (By Mr. Rich) If, just for the sake of my question --

A Uh-huh.

Q -- one or more aspects of the Regent Guide were found by a court to be improper advice or provide inadequate guidance as to copyright values, do you have an understanding whether, if Georgia State followed those guides, even if those guides were by some court determined to be inappropriate in one or more particulars, that Georgia State's conduct therefore is innocent legally?

A I don't know.

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) You don't have a view?

A I'm sorry?

Q You don't have a view?

A I don't know.

Q You don't know.

In working with the committee process that just concluded, did you come to have an understanding whether the principal objective was to create a set of procedures that seemed reasonable, or did you come to a further conclusion that that isn't sufficient, that even following those procedures, it's important that the result itself comply with the copyright law? Do you understand my question?

A There seemed to be two of them there,

but...

Q All right, I'm sorry.

MR. SCHAETZEL: Objection as to form.

And to the extent you can answer the question without revealing communications at the -- that are privileged at the committee meeting, please try and answer whichever question you think is on the table.

THE WITNESS: It -- one of them was what the primary purpose was --

MR. RICH: Yes.

THE WITNESS: -- and the primary purpose, I believe, was to develop a policy, so not that the procedure was an important component of that, but that the policy was the piece that was most important.

Q (By Mr. Rich) Let me take an extreme example just to finish this line of questioning. Let's assume that a professor went through the checklist --

A Okay.

Q -- and to the best of that professor's ability and judgment, made decisions that taking 90 percent of several works was central to the pedagogical purpose of the course, was not a greater taking than absolutely necessary to achieve purposes, didn't believe it would hurt the market for the work, et cetera, so did his best --

A Uh-huh.

Q -- but came out with what other people might look at and say, "That's a very generous taking under copyright."

A Uh-huh.

Q Would that outcome trouble you?

A No. Because I would assume that there would also be the times when the determination would be made that it was not a fair use, when actually it was; and so there's actually, ultimately, a balance between when people make the wrong decision on either side.

Q That's a bit of a systemic look at this practice, you're saying?

A Uh-huh. And it's a very subjective determination. And I think it's just that you take all of the information, as a faculty member, that you have at hand and you make your determination and proceed.

Q What procedures, if any, exist or are

contemplated to create some degree of uniformity in outcomes in applying the fair use checklist to particularized works?
A What I'm --
Q Let's start within Georgia State University.
A What I am aware of within Georgia State University is the training that we've talked about that faculty will be going through.
(Mr. Krugman entered the proceedings.)
MR. RICH: That's Mr. Krugman here.
Hi, Edward.
Q (By Mr. Rich) And would you give the same answer across institutions within the University System --
A I don't know.
Q -- to see if there's some uniformity?
A I don't know.
Q As a practical matter, what is your expectation -- investing as many as potentially 1200 faculty members, give or take, with the judgment to work through these checklists, what's your judgment about the variation in practice that will result?
A I don't know.
Q Was that something that your committee

thought about?

MR. SCHAETZEL: Objection to the form. You're asking now for communications between committee members --

MR. RICH: Yeah.

MR. SCHAETZEL: -- as to that --

MR. RICH: Yeah.

MR. SCHAETZEL: As you know, we've asserted the privilege for that. Can you rephrase that question?

Q (By Mr. Rich) Let me ask you first: Does that concern you at some level, that is, delegating essentially the fair use determination to so many individual faculty members?

A I think it's exactly appropriate to put it in the hands of the faculty member. They're the only person who can make the determination.

Q And apart from training vehicles and the ability of what you called, I think, technical technicians --

A Uh-huh.

Q -- to reject what they might regard as extreme cases of application of the checklists --

A Uh-huh.

Q -- for example, an entire work, yes, you don't believe it appropriate -- I should say you -- let's go to you, you don't believe it appropriate that there be any other oversight given to these determinations of the faculty?

A   I don't think so, no.

Q   And in all events, none is contemplated presently; is that correct?

A   Not to my knowledge.

Q   Okay. Did you have occasion to discuss this lawsuit with Charlene Hurt, whether before her retirement or since?

A   Yes.

Q   Please describe the nature of those conversations.

A   It was a brief telephone conversation where she said that the suit had been filed and that there was information about it that I could look at online with the actual filing, and that legal counsel was involved and the attorney general's office was involved.

Q   After arriving at GSU in August of 2008, did you do -- did you personally take any steps to familiarize yourself with the nature and extensiveness of the course offerings by the E-Reserve system?

A No.

Q Did anyone come and brief you on that subject?

A No.

Q Do you receive periodic reports on that topic?

A No.

Q Does anyone on the library team perform any of those --

A I don't know.

Q With respect to the 1997 Regents guidelines, since coming to GSU have you formed a judgment as to the degree to which the framework and recommendations of the guide have actually been followed by faculty in connection with E-Reserve's postings?

A No.

Q To your knowledge, has anybody on the library staff made it a part of his or her duties to ascertain the degree of which the implementation of the E-Reserves process comports with then-prevailing copyright guidelines?

A I don't know.

Q Is anyone assigned to perform that function?

A I don't know.

(Discussion off the record.)

MR. RICH: Let's mark as Plaintiff's 18 -- these are the Bates numbers -- a document bearing Bates Nos. 2011-3 through -- well, it's actually -- it's -- the packet I have is misnumbered, but it's collectively 2011-1 to 2011-6, bearing the Georgia State University library logo and titled "Course Reserves, ERes Guidelines" at the first page.

(Exhibit 18 marked for identification.)

Q (By Mr. Rich) Do you recognize the documents which have been put in front of you?

A Yes.

Q And can you identify them, please?

A These are the Web site -- this is the Web site information for course reserves for Georgia State University Library.

Q And is --

A And they -- I believe they're all dated as to when they were revised or implemented.

Q At page dash 2, it says, "Revised November 10, 2005," is that correct?

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) Again, they may be stapled the way mine was originally; one and two are at the back of the package.

A Okay.

Q I apologize for that. Yeah.

A Uh-huh.

Q And the document 200 dash -- bearing Bates 200 -- 2011-3 indicates a revision date also of November 10, 2005? That would be the first document, I think, in your statement package.

A Uh-huh, yes.

Q Are these still -- do these still reflect current Georgia State ERes guidelines?

A I don't believe so, no.

Q As of when have they become inoperative?

A When the new policy was approved by the chancellor.

Q That was extremely recently, yes?

A Yes.

Q Okay. So is it accurate that until literally days ago or, at most, weeks ago --

A Uh-huh.

Q -- Plaintiff's 18 represented the prevailing ERes guidelines at Georgia State?

A Yes.

Q Now, prior to today, what did you do after arriving at Georgia State to familiarize yourself with these guidelines?
A Along with all of the other documents that I was looking at for the library, I reviewed these documents online.
Q And did you develop any judgments about the degree to which, from your background and experience, they comported with copyright law?
A No.
Q No?
A No.
Q Did you have occasion to have any conversations with anybody on your library staff or otherwise about these guidelines?
A No.
Q Did you have occasion to inquire as to the degree to which these guidelines were, in fact, being complied with in practice?
A No.
Q Ask you a few specific questions about these, if I may.
A Uh-huh.
Q Let's stay in the order in which you have these documents, which is on the first page in the

package, which is 2011-3, "Course Reserves - About ERes."

A Uh-huh.

Q It's identified as an "Easy Resource & Efficient Service is the motto for our ERes system." Do you see that?

A Uh-huh.

Q Is there anything in the new set of policies that have replaced these that are intended to change what's being conveyed by that statement?

A I don't know.

Q Do you believe that it is still an intended function of E-Reserves to be an easy resource and efficient service for the GSU community?

A I hope so.

Q And in the body of this, it says, "For the students, ERes offers single point access for students to search both digital and physical copies of course reserves. An unlimited number of students may reference digital materials 24/7." Does that remain fundamentally true today?

A I'm not sure it was true then, actually. I think it's a -- I think the way it's stated is that the students enrolled in class, an unlimited number of students may search the system, but that actually the ones that can get to the materials for their class are limited by the ones that are in the class.

Q So the point of difference you're pointing out is with the second sentence, an -- that I read, an unlimited number of students may reference the material?

A I think it's an interpretation of how you would read that. If you think that all students can get to all materials, the answer is that's not true and never has been true.

Q If it were construed as all students within the province of the courses for which they have signed up have access 24/7, would that be an accurate statement?

A Yes.

Q Farther down that paragraph, it states, "To comply with copyright restrictions, course pages containing copyrighted material will be password protected." Do you see that?

A Yes.

Q What's your understanding of the relationship of password protection to copyright law?

A That a -- that a piece of information that is provided to students to use for a course is only available to the students that are enrolled in that course.

Q And what is the -- what is the copyright principle or -- what is the copyright principle that underlies or supports that practice, as you understand it?

A It's that it is necessary for that specific teaching situation by that specific faculty in that specific class.

Q To your knowledge, once a student in a course gains password access, what is that student entitled to do with the reading materials? What activities can that student engage in?

A I believe, generally, it would be the ability to see a citation, to read material that has been digitized, and to make a copy if the faculty member has left the material so that it could be copied, so a PDF file that you could then print.

Q And is there anything, to your knowledge, technologically that prevents a student from transmitting that PDF file to third parties who are not enrolled in the course?

A I don't know.

Q You don't know?

A I don't know.

Q Would that be a matter of interest to you

to know the answer, as a matter of copyright law?
A I don't know that it's terribly relevant because there's an acceptable use of materials that is part of the university policy to begin with, and that's that if you are receiving material that's password protected, then it is entitled just for that class. So it kind of is covered by another policy in terms of what students are doing.
Q So your understanding is that a student would violate some code of conduct --
A The acceptable use of technology --
Q -- if they were to engage in that --
A Right.
Q -- he or she were to engage in that technology?
A Yes.
Q Do you know, in fact, the degree to which, though, notwithstanding that policy constraint, students over time have distributed PDFs acquired through the E-Reserve system to third parties not entitled to receive them?
A I don't know.
Q Is the university -- is Georgia State University capable of tracking any such transmissions, to the extent they occur?

A I don't know.
Q What would be required to get an answer to that question?
A I don't know.
Q Who would you --
A It would --
Q -- want to inquire of to get the answer?
A It would be a technology solution to a technology question, so it would have to involve campus IT people.
Q How are passwords created, do you know?
A I don't.
Q Is it done by the individual instructor?
A I don't know.
Q Does anybody keep a sort of central repository of passwords in the library?
A I don't know.
Q Is there any minimum requirement of words, combination words, numbers, et cetera?
A I don't know.
Q Letters, numbers? Don't know?
A No.
Q Who would know?
A The people who are creating the passwords and the technology people on campus.

Q Is there any one or several people on the technology side who would be most likely to know the answers?
A I don't know.
Q Is that a group of people who you supervise or, at least by function, oversee?
A The library people --
Q Library and technology people?
A -- would be, but not the campus technology people, no.
Q Now, am I correct that if a professor possesses, let's say, first-generation copyrighted works, those works can be offered up for E-Reserves provided they meet his assessment of the checklist, correct?
MR. SCHAETZEL: Objection as to form.
THE WITNESS: Yes.
Q (By Mr. Rich) And in addition, if works are part of the library collection, but not physically possessed or actually possessed by a given professor, he or she can request the library, once that fair use determination has been made, to access those materials and make sure they are also placed in the E-Reserve system; is that correct?
A There's a distinction between what we own

in terms of a physical piece --
Q Yes.
A -- and what we own in terms of licensed materials.
Q Yes.
A So the answer is yes, but I think that we would provide access in different ways.
Q Can you just go through the two distinctions in terms --
A Well --
Q -- of how that would happen?
A -- if it's a physical piece, the decision would then have to be made, in terms of fair use checklist, whether or not we would be making a digitized copy of a piece of that work --
Q Right.
A -- or whether or not, if it's something that we have licensed content, whether we would provide -- be providing a link to the licensed content that we already have available --
Q Right.
A -- that's available digitally.
Q If you would turn to the next page, which is dash 4 --
A Uh-huh.

Q -- and read to yourself the bullets under "Course Reserves - Printing Tips." I'll ask you a question or two.

A (Witness complies with request of counsel.)

Q For whose benefit is this -- is or was this document written?

A I don't know, but I am assuming it would be students.

Q And to your knowledge, did it accurately -- does it accurately set forth the procedures by which students can print materials placed in the E-Reserve system?

A I don't know, because it would depend on whether they were printing from within the library or whether they were printing from home, office, someplace else.

Q If one were printing from home, for example, do you have an understanding of how one would access the E-Reserve system?

A Via one's PID and password.

Q Is one able via the E-Reserve system to print at home?

A I believe so, yes.

Q Print anywhere in the world if you can get access into the system?

A And if you're somewhere that's -- taking a class that's got reserve materials, yes.

Q To your knowledge, anything in the new policy that will alter the techniques or procedures by which students can access, read online, save documents to disks or locally, and/or print E-Reserve materials?

A I don't believe the new implementation has any printing tips in it, but I'm not 100 percent sure of that.

Q It doesn't mandate any change in those practices, correct?

A Not to my knowledge.

Q If you turn to the next page, please, which has the hyphenated -- dash 5, if you look at the question and answer under "Are textbooks automatically placed on reserve," do you see that section?

A I do.

Q States, "No. Only materials that instructors submit for their courses are considered for reserves. Reserves are intended to make scarce copies of supplementary materials available to students in a specific class. Students are responsible for purchasing the textbooks that they

need for their courses." Do you see that?
A Yes.
Q My question is: Is that statement intended to apply solely to physical reserve practices or to E-Reserve practices as well?
MR. SCHAETZEL: Objection as to form.
THE WITNESS: I don't know. But because textbooks are largely still in paper form, the assumption would be that it's paper.
Q (By Mr. Rich) Do you have an understanding whether existing practice at Georgia State University, with respect to E-Reserves, implicates the offer solely of supplementary course materials to students?
A Could you restate the question?
MR. RICH: Could you read it, please? If after she reads it, you don't get it, I'll rephrase.
(Record read.)
MR. RICH: And supplementary as opposed to required.
THE WITNESS: Yes.
MR. SCHAETZEL: Objection as to form.

Please go ahead.
THE WITNESS: Yes.
Q (By Mr. Rich) You do have an understanding that that is the practice?
A That is the practice.
Q And what is your understanding based on?
A My reading of the guidelines that we have in place, the implementation that we have in place, and common practice.
Q Now, you testified a little earlier that you haven't really familiarized yourself with particulars of E-Reserve offerings, having received reports and the like --
A Uh-huh.
Q -- am I correct?
A Uh-huh.
Q How then are you able, with any degree of confidence, to provide the last answer, which is, I believe, that referencing activities -- "implementation that we have in place and common practice," how do you know what common practice is?
A By "common practice," I was referring to common practice in libraries.
Q Focusing, though, specifically on Georgia State University, what knowledge, if any, do you

possess as to the degree to which E-Reserves offerings, over the span of the time since you have even arrived, comprised solely supplemental as opposed to required course readings?

A I do not have that understanding.

Q Would that be something you would be interested in ascertaining, namely the answer to that question, in making judgments about how to apply fair use principles to E-Reserves listings?

A Only insofar as we were to do that going forward, not going backward.

Q Going forward, how would you be informed -- let's assume you were to learn that practice has been a mix --

A Uh-huh.

Q -- in fact, that there are as many required course readings as there are supplemental. Going forward, what would the implications of that be, as you've thought about it, for future fair use determinations?

A I don't know what the implications would be.

Q You would need to think more about that?

A Yes.

Q You earlier testified that in the

coursepacks setting, since you were dealing with required readings --

A Uh-huh.

Q -- and the equivalent of a textbook was being created, it was evident that permissions would be required, correct?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: And I used the textbook as an example and you picked that up, but yes, the permissions would be required for a coursepack.

Q (By Mr. Rich) Do you believe there's anything, as far as copyright law is concerned, that creates a difference in the application of fundamental copyright principles simply because copies are being made physically as opposed to electronically? In and of itself, do you find that that distinction should create different rules of copyright law, in your experience?

A I don't know.

Q Are you aware that the Regent Guide disclaimed any such distinction in copyright law?

A I did not know.

Q Okay. Are you aware of whether the current policy speaks to that issue?

A I don't know.

Q If you would turn to the next page, which is hyphen 6 at the top. Under "What I" -- "What do I need to know about copyright" --

A Uh-huh.

Q -- the statement is made that, "Students may print one copy of a text reserve item for personal reading, private study, research, or education." Do you see that?

A Uh-huh.

Q Do you understand that to be a statement being made in the context of physical reserve desk type activity?

A I don't know.

Q Reading this doesn't inform your judgment on that?

A No.

Q Would it comport with your understanding of the new policy were professors to put full text materials on physical reserve and were the policy -- and were Georgia State University to permit students to make copies of the entire text for their personal study?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: I don't know.

Q (By Mr. Rich) It wouldn't trouble you if that happened?

MR. SCHAETZEL: Same objection.

THE WITNESS: I can't envision it happening, so it's hard for me to decide whether it would bother me or not.

Q (By Mr. Rich) Do you interpret the statement "students may print one copy of a text reserve item for personal reading, private study, research, or education" as foreclosing that scenario?

A Not necessarily.

Q Let's turn to 2011-1, and the second block paragraph headed "Submission of Digital Print Requests," do you see that?

A Uh-huh.

Q The fourth bullet reads, "The GSU library will not accept coursepacks for electronic reserves." Do you see that?

A Uh-huh.

Q Do you have an understanding of what that means?

A That if a faculty member has created a coursepack for a class, that it cannot be put on reserve, either electronic or physically.

Q And for this purpose, do you have in mind that the faculty member has put together and physically bound materials together, or not necessarily?

A Presumably it would be the coursepack that has been put together to be sold at the bookstore.

Q What if instead of -- what if instead of assembling it for purposes of the bookstore, the professor simply stacks on top of one another a series of articles or chapter excerpts that it wants to bring to the library staff, puts it down at the desk of the technical person, says, "Here's my checklist as to each item. It makes the grade. Please scan and put this body of material -- instead of bringing it to the bookstore, have the students buy it, please put it up on E-Reserves," permissible conduct?

A The faculty member has conducted a fair use analysis of all of the material, and if the faculty member has determined that that is fair use, then that is permissible conduct.

Q And what makes that material less of a coursepack as I described it?

A That the faculty member has determined that it is supplemental material for the course and that they have gone through and taken -- taken the time to do the fair use analysis in order to determine that it is a fair use.

Q So if, instead, the professor comes in and says, "This is my required reading list for this course, but instead of having the students pay a lot of money at the bookstore for it, I've parsed each item and found out it meets the checklist, so here, please scan it and put it up," so the net effect for the student is exactly the same, requires the same body of material, but doesn't have to go to the bookstore to buy it, is that proper practice, in your estimation?

A You --

MR. SCHAETZEL: Objection as to form. Go ahead.

THE WITNESS: Sorry.

MR. SCHAETZEL: It's okay.

THE WITNESS: You used the word "required." It would not be an acceptable use of the E-Reserve system.

MR. RICH: Thank you.

Q (By Mr. Rich) If we go down, please, to "Please Note: Copyright Guidelines" --

A Uh-huh.

Q -- what I want to ask you is, as we go through 1, 2, and 3 -- actually, 1 and 3, I would appreciate it if you could tell me first your understanding of the limitations as they appear here; and then secondly, I will ask you if you believe the new policy changes in any way those limitations, either presumptively or explicitly.

So let's start with No. 1. "Materials," it says, "that can be placed on electronic reserve without obtaining copyright permission include: 1) Articles from journals owned/subscribed to by GSU." Do you see that?

A I do.

Q Do you understand that to contain any limitation on the numbers of articles from a particular journal issue that can be offered?

A Not in terms of policy, but certainly in terms of practice.

Q I'm sorry, in terms of?

A Practice.

Q Can you explain what you mean by that?

A That if a faculty member were to bring a journal that were owned by the library and say, "I would like to put the whole journal" -- every article that's in it is something that's supplemental reading, there would presumptively be questions asked by the staff.

Q But short of that example of the totality --

A Uh-huh.

Q -- do you understand these, at least, ERes guidelines to otherwise limit the number of takings from a journal issue? Is that solely in the discretion of the professor, short of the full taking?

A I don't know.

Q What would you want to know to help form a judgment?

A Whether or not the staff looked at this and -- I just don't know how they would respond to it. I would think that they would question large amounts of materials from one issue of a journal even if it were not the totality.

Q So your answer, though, sort of defaults to what library staff reaction might be. Do you have an understanding of what the ERes guidelines actually intended?

A I don't know about that.

Q Do you have an understanding of what the policy intends, the new policy intends with respect to use of journal articles?

A It would require the faculty member to go through the fair use analysis of each piece and make that determination.

Q Without any numerical limit per se on the --

A Right.

Q -- numbers of contributions from a particular journal issue that might qualify for fair use?

A Right.

Q No. 3 says, "One chapter or less" -- pardon me, "One chapter or less than 20 percent of the content from a book." Do you see that?

A Uh-huh.

Q Just looking at that, or otherwise informed by your knowledge of this, do you understand, is that a lesser than or greater than kind of concept? In other words, if I have a chapter that is 30 percent of the book, is that good; or does it have to be, at most, 20 percent of the book? How do you interpret this?

A I don't know.

Q You don't know, okay.

Under the new policy, is there a similar one chapter or less than 20 percent of the content

for a book --
A No.
Q -- limitation?
What is the current method for determining the proper amount of a book that can be utilized for E-Reserves?
A The faculty member goes through the analysis and makes the determination.
Q Do you envision the possibility that, in one or more cases, it might be determined reasonably that more than 20 percent of a book qualifies for fair use?
A I can't think of specific examples, but I would think it could happen if the faculty member has done the analysis and has made that determination.
Q Do you have an absolute upper limit in your mind that says in no case could I envision more than X percent ever qualifying for fair use?
A I think it's impossible to put a number on this, so no, I don't have an upper or a lower limit in mind for this.
MR. RICH: I think we're out of tape. Let's pause, and maybe you want to take a lunch break. Does this make sense?
MR. SCHAETZEL: Makes sense to me.

THE VIDEOGRAPHER: Off the record at 12:20:21.

(Lunch recess taken.)

THE VIDEOGRAPHER: This is Tape 3. We are back on the record at 1:15:35.

MR. RICH: Good afternoon. Let's mark as Plaintiff's 19 a document bearing production numbers 370 to 371, labeled "ERes."

(Exhibit 19 marked for identification.)

Q (By Mr. Rich) Are you able to identify the document that's been placed in front of you and marked as Plaintiff's 19?

A I'm not. I'm sorry.

Q It appears on its face to be a form to be filled out by faculty wishing to place materials on ERes. Does that appear to you to be its function?

A It does.

Q Do you know if this form is still currently in use?

A I don't know.

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) To your knowledge, are documents of this sort, once completed, collected by anybody in the library staff?

MR. SCHAETZEL: Objection as to form.
THE WITNESS: I don't know.
Q (By Mr. Rich) Who would know the answer to a question like that?
A The person in charge of that unit or Laura Burtle.
Q And is Laura a direct report to you?
A Yes.
Q So if you, for example, were interested in requisitioning a file, if such a file existed, of completed ERes forms, you would contact Laura and make that request?
A Yes.
Q She would likely fulfill that request?
A I hope so.
Q To the best of her ability?
A To the best of her ability, yes.
Q Okay.
MR. RICH: Let's mark as Plaintiff's 20 a document bearing production numbers 7945.005.xls-1 through 377.
(Exhibit 20 marked for identification.)
Q (By Mr. Rich) I don't want you to read every line of this document, unless you care to.
A Good.

Q I'll represent to you that this production was made at the plaintiffs' request by your counsel in this litigation reflecting E-Reserves offerings from the period, as noted at the top, of 1/1/08 through 5/15/08 with course names. Do you see that heading at the top?

A Yes.

Q And this was generated, we're advised, out of Georgia State's records reflecting that activity during the spring term.

My first question is whether, just scanning this, the volume of works offered on E-Reserve comports with your understanding of what one would expect over a period roughly of, you know, a semester?

A I don't know.

Q You don't know what you would have expected?

A I don't know what I would have expected because I'm not familiar enough with what's being taught at Georgia State in any given semester and how faculty members have traditionally used E-Reserve.

Q By our calculation, there are 426 courses listed in this material and about 4,000 reading files. More than 60 of the course pages contain 20 or more files, meaning 20 or more course reading materials. Seven of these course pages contain more than 50 files, meaning 50 sets of readings apiece.

As someone who supervises the library operations and the E-Reserve operations at GSU, does, for example, the notion that under the preexisting copyright guidance, seven course offerings contained more than 50 separate course readings, does that concern you as a matter of copyright law?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: Not particularly.

Q (By Mr. Rich) What more would you want to know to get more -- or perhaps -- "not particularly" because what more would you need to know to have that concern?

A The role of those materials in the course --

Q Okay.

A -- and what the faculty member deemed necessary for the course and what the faculty member deemed supplemental to the course.

Q Okay. And since we're using those terms a fair amount today, could you define the distinction, as you understand it, between necessary and

supplemental?
MR. SCHAETZEL: Objection as to form.
THE WITNESS: Simplistically, it would be is it going to be on the exam.
Q (By Mr. Rich) And if it is?
A Then it's a required reading, it's a required piece of material. If it is something that is to enhance the student's understanding of what is going on, then it is a supplemental reading.
Q And why does it matter, for purposes of copyright law, whether it's necessary or supplemental if, in fact, the acts of copying are occurring?
MR. SCHAETZEL: Objection as to form.
THE WITNESS: Because with the ability to apply the fair use doctrine, that is one of the four factors that one looks at in terms of whether or not it is a required piece of material for the course or supplemental for the course.
Q (By Mr. Rich) You understand that distinction to be one of the four factors or to be --
A A component --
Q -- embedded in it?
A A component of one of the four factors.

Q Which one is that, which factor? I don't care by number, but what's the concept of the factor?
A I'm trying to think of the...
Q Would it help you to see --
A It would --
Q -- the section of the law?
A It would help me to see the section of the law.
Q Sure.
A There's four little things.
(Discussion off the record.)
MR. RICH: I just have one copy, Steve. I don't think we need to mark it. I'm just showing the witness Section 107 of the Copyright Act of 1976.
THE WITNESS: I think there are two pieces that it could fall into, the purpose and character of the use, which is whether or not it is a required piece of material for the course or not. And then you can -- because it's a -- because it's so subjective, you could get into that, also, with the amount and substantiality of the use.
MR. RICH: Thank you. You can keep

that there if you want.

THE WITNESS: I'm not a lawyer, however, so...

MR. RICH: You're doing very well.

Q (By Mr. Rich) Looking at this collection of offerings -- strike that.

You testified earlier that you don't regularly receive reports, whether of this -- in this format or otherwise, as to the utilization of the E-Reserves system; is that correct?

A Yes.

Q You could request such reports in your role as dean of libraries?

A Yes.

Q And presumably, within the technical limits of the system, such reports would be generated at your request, correct?

A There are technical limits of the system, but yes, there could be reports generated.

Q And if you wanted, for example, to understand from this collection of works what the -- on a per-course basis, what the total pages of copyrighted material comprising the course readings were, presumably that information could be generated as well, right?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: The total number of pages for each course in terms of reading could be generated --

MR. RICH: Reflected on the E-Reserves list.

THE WITNESS: I believe that technically, we could do that, yes. Technologically, we could do that.

Q (By Mr. Rich) And you could track numbers of chapters of particular works in relation to the total number of chapters, if you wished to do that, correct, that data could be captured and reported, true?

A Not through the E-Reserve system. It would require additional work to go back to a -- the original work and determine how much of that work has been used. But yes, that could be determined.

Q Or alternatively, that information could be requested from the professor when the professor filled out whatever form that professor used to put the materials into the system, correct?

A I would think so, yes.

Q Have you given any thought to the kinds of information beyond the completed fair use checklist in each case --

A Uh-huh.

Q -- that might actually be useful in informing a well-rounded fair use judgment?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: I'd like to draw a distinction between, again, looking backward, which I am not doing, and looking forward, which I'm willing to do --

MR. RICH: Fine.

THE WITNESS: -- and could see that as we evaluate the success of the implementation of the policy, as well as the training that we're providing, that we would be looking at some of the materials that have been placed on reserve to determine whether we feel that faculty have a good understanding of what the fair use analysis is.

Q (By Mr. Rich) That's, sitting here today, normatively something you would like to do, I take it; is that your testimony?

A I would not use the work "like." I would feel that I probably should do that.

Q But sitting here today, no plan for implementing that kind of examination is yet in place; is that correct?

A In the couple of weeks that we have had, we have not implemented that plan, no.

Q Do you have any notion of over what time period that plan will or may be implemented?

A I think the first piece that we're looking at is how do we implement the process that will take us through the end of this semester knowing that we have -- this will be a very light load for us because we're part way into the semester, and then we would be looking at what we would be doing differently over the summer in order to implement this in the fall, because it will be significantly different when we have to do a full semester's worth of implementation.

Q Do you --

A So --

Q Thank you.

Do you have an impression, when the new policy is in place, overall how practice under that policy, say with respect to a compilation of works of this scale over a term, is likely to differ from prior practice?

A I don't know, because it will be dependent

on how the faculty member goes through the checklist and --
Q As the committee pursued its work --
A Uh-huh.
Q -- was there any assumption whether, at the end of the new process, on average, there will be fewer, more, or about the same works for which a fair use determination has been made which are placed into the E-Reserve system of the various institutions?
MR. SCHAETZEL: Objection as to form.
And please answer to the extent you can without divulging any attorney-client communications.
THE WITNESS: I don't recall there being any discussion of quantity, whether it would go up, down, or stay the same.
Q (By Mr. Rich) I'm going to ask you a series of questions just about the mechanics of the E-Reserves process. And in providing these answers, if convenient for you, if you could identify in any particular where you would expect the aspect you're discussing to change under the new policy, I would appreciate your flagging that for me.
I would like to just sort of take it through the intake process and then through the

processing. Now, I am a professor of sociology, and I take it that under, certainly, the new policy, I now to have to put my proposed materials through this filter of this checklist. Is that correct?

A That is correct.

Q All right. And then I will be requested to -- and I probably should mark it because there's a new form, I believe, that may be in place here, so why don't we keep up with where we are here. Let me just find this document.

(Discussion off the record.)

MR. RICH: Let's mark this as Plaintiff's Exhibit 21, which is a collection of documents bearing Bates stamps 21107 through 21117.

(Exhibit 21 marked for identification.)

Q (By Mr. Rich) Do you recognize what we've marked as Plaintiff's Exhibit 21?

A I do.

Q Can you identify it?

A It is the printout of the electronic reserves request form interspersed with links out to some of the USG copyright policy.

Q Is this a relatively new set of documentation?

A It is.
Q And for what purpose was it created?
A In order to reflect changes that have taken place in the policy that was approved by the chancellor.
Q Okay. And can you tell me the principal people who were involved in the creation of these forms?
A Laura Burtle and the staff in the reserves department and me. And I believe Cynthia Hall did a final review of those.
Q And I take it the purpose of these is to assist in implementing the new policy; is that correct?
A Yes.
Q And did you receive any assistance from any resources outside of Georgia State University -- did you or your colleagues, to your knowledge, receive any assistance from outside of Georgia State University in preparing these materials?
A Not in terms of contacting anyone to help us with them, but in terms of looking at what other people have done with their E resources materials, yes, we looked at other Web sites.
Q Within the Georgia University System?

A Both within the Georgia system and outside the system.

Q I see. And did you, in fact, make changes to or adapt any of the forms that -- in their final form based on those reviews of other policies?

A I don't recall.

Q Am I correct that there was some communication in which you were involved dealing with the concept of perhaps creating some more uniform set of forms of this type across the various institutions within the University of Georgia system -- Georgia State system?

A Not across the system. The -- the three major research institutions, we did talk about whether or not we could have some similar wording for our E-Reserve materials, yes.

Q And where does that stand?

A I don't believe it's gone anywhere, to be honest. I think that we were given contact names at both the University of Georgia and Georgia Tech, but I don't know that it's gone anywhere.

Q If you flip several pages into this exhibit, I'm looking specifically at the third page -- the fourth page, I guess it is, "Electronic Reserves Request Form," page 21110. Indicates sort of the menus of options available in terms of the forms to be filled out; is that correct?

A Yes.

Q And, for example, if I am in possession of a print book, excerpts of which I want to utilize with my students -- I'm back wearing my professor of sociology hat -- which of those forms do you understand I would fill out with as to that excerpt?

A If you were talking about parts of a book --

Q Yes.

A -- that you would like to make available --

Q Yes.

A -- it would be under electronic reserves, the second item.

Q And can you show me which page of this attachment reflects the form that I would fill out?

A The one that says, "Electronic: Book." It's 2115.

Q Okay. And then I am -- I, as the faculty member, will fill out the information, including responding to the "This item can be placed on electronic reserve because (choose one)" listing, correct? And if I have decided that it's not an item already available for permissioned use, and if I've decided that it meets the criteria of the fair use checklist, I take it, I would blacken the second of the listed options there, "It falls under fair use according to the fair use checklist I completed," is that correct?

A Yes.

Q That would be the process I would engage in; is that correct?

A Yes. So -- this is all online, so this is -- it's a --

Q I would --

A Yes.

Q -- click that button as --

A Click that button, yes.

Q Okay. And to the jargon that my colleague to my right is far more fascinated than I am.

And then the information specifically that I would be required to put are listed in the following boxes, correct, including chapter or page numbers, correct?

A Yes.

Q And those are in the alternative, so that if I'm taking all of Chapter 1, I would simply insert "Chapter 1"?

A Yes.

Q And if I were using Chapters 1 and 3, I would say, "Chapter 1, 3," or something like that?
A (Witness nods head affirmatively.)
Q Whereas, if I was taking portions of chapters or the book doesn't lend itself to chapter designation, I would list the inclusive page numbers I was taking?
A Yes.
Q Okay. And if you go back one -- or forward one page, back to 1114, I take it that reflects the form that I, as the professor, would fill out with respect to any journal articles, let's say, that I propose to use as well; is that correct?
A Yes.
Q And the -- moving again towards the front, there is a listing at 21111 which says, "Print: Book." What is that designed to fulfill? Is that a physical reserve form as opposed to an electronic reserve form?
A This would be a hard-copy book.
Q Hard-copy book?
A Uh-huh.
Q So is the reference to "Electronic: Reserves Request Form" a misnomer as to that?
A No, because you are making the request

electronically. Faculty members do not have to come into the library to make the request.

Q So in this --

A So it's not -- in this case.

Q Unlike the normal connotation, this means the manner in which the request is being fulfilled as opposed to the medium on which the works are being made available?

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) Is that correct?

A But we have put this all together -- yes, it is in this case. But because there are so many of our materials that are being done in an electronic environment, it falls in there with the rest of the materials.

Q Okay. And do you understand these forms to supersede, at least as regards E-Reserves listings, what we marked as Plaintiff's 19? Do you know one way or the other?

A That is my understanding.

Q Okay.

A Yes.

Q So as far as the process has gotten now, I have filled this out for the various works that I --

A Uh-huh.

Q -- propose. Where does -- where do these -- who receives these? These are prepared online. Is that the only format in which these forms will be accepted? Is there a -- an ability to fill them out physically, or will there be?

A I believe there still is the ability to fill them out physically.

Q Okay. So let's start with the physical forms.

A Uh-huh.

Q To whom will those forms -- are those forms to be delivered?

A They will be taken to the reserve desk in the library.

Q Okay. And that's both for both physical reserve requests as well as electronic reserve requests?

A Yes.

Q And will there be a designated custodian who will do whatever needs to be done with those forms, including maintain them or archive them?

A It is the function of that department to maintain them under whatever limits I provide.

Q Have you determined limits?

A At this point, we keep them per semester.
Q Okay. And with respect to materials to be offered students via E-Reserves, I take it that the professor at some point needs to deliver any copies that he or she, him or herself, possess for the purpose of getting them scanned; is that correct?
A If they are in paper format, yes.
Q If they're in paper format?
A Yes.
Q And again, if they're in the electronic collection of the library, that's different?
A Right.
Q Right. So what do I do? I've now got my 12 paper excerpts that I want scanned and put up on the system. Where do I bring those?
A To the library.
Q Same place?
A Uh-huh.
Q Reserve desk?
A Uh-huh.
Q And they're simply then collected with or somehow married to the request forms that I will have filled out?
A Yes.
Q Okay. And so even if those have been

prepared online, there will be some technique. What is the technique to marry the online submissions to the physical stack?

A It would be, I believe, a manual process of taking the request and taking the physical objects and linking them together.

Q Okay. And then what is the next step that occurs with respect to those materials?

A They are checked against the collection that we have to make sure that they're not something that we already have available as part of our licensed collection. Regardless of whether the faculty member has asked for that, we will be doing that.

Q Is that an online search?

A It can be an online search, it can be a physical going into the stacks in the library and looking at materials, yes; but for the most part, it would be an electronic search.

Q Is that a new practice to be implemented contemporaneously with the new policy, or is it your understanding that that process of checking against existing collections and licenses has been an ongoing practice?

A I believe that is a new practice.

Q Okay. Please proceed. Following that?
A Following that, because the faculty member has gone through the process of telling us that this is an appropriate and acceptable use, the staff would then make the materials available in the format that the faculty member has requested unless there is something that is a red flag to that staff that makes them say, "Hmm, we need to investigate this further."
Q And as you testified this morning, if I recall it correctly, the one red-flag example that came to mind was, well, wait a minute, this looks like an entire textbook, let's say, I'm not so sure this is --
A Uh-huh.
Q -- appropriate. Now, if that staff member makes that judgment, what does he or she do at that point?
A The first piece that we have asked the staff to do is to notify the faculty member and say, "This one seems questionable to us. Can you reinforce for us that you have gone through this process?"
Q And let's assume that person comes to me, I'm the sociology professor, and I say --
A Uh-huh.

Q -- "I'm comfortable. I think it's the right choice" --
A Uh-huh.
Q What happens next?
A At that point -- and again, understand we are in a new implementation here -- my guess is that the clerical person, the staff person in the library would go to a supervisor and say, "I'm still uncomfortable with this one. Would you look at it?" And so a supervisor would be involved at this point in looking at that question.
Q Tell me the basic sort of education levels of the first-level person at the desk and then the next-level person at the desk at that point. What are their backgrounds?
A It would depend on what hour of the day you came into the library.
Q I'll take all the different variations.
A All the different variations, it could be everyone from a student who has been hired to staff that desk and basically is just kind of standing there and saying, "Yes, thank you, I'll see what I can do with it," to someone who has maybe a high school degree, to someone who has finished college, to someone who may have a library degree or a

master's degree in some area. Experience could range from almost nothing to 8, 10, 15 years of experience working in a library, so a very wide range.
Q   It's a function of who will take that position --
A   Uh-huh.
Q   -- effectively, yes?
A   Uh-huh.
Q   And at the next level, what did you call it, a system supervisor?
A   Is somebody who has -- in our instance, it's someone who has many years of experience, I'm thinking in excess of 20, in the library and would be very comfortable going back to a faculty member and saying that, "We would like you to rethink this one," or just saying, you know, "Rather than get involved in this back-and-forth, I'm going to bump it upstairs or send it over to legal."
Q   Now, "bumping it upstairs," do you mean bumping it to --
A   Would be coming to me --
Q   -- you?
A   -- or to Laura Burtle, yes, depending on which one of us is available.
Q   And would Laura's or your judgment be

final --

A No.

Q -- in that situation?

A No. We will not -- we will not make decisions about things like this, but we would support the staff member's decision to recommend that it be bumped over to legal.

Q Final determination would be made by legal in that situation?

A I don't think so, because I think it would be legal's -- I think legal would work with the faculty to make sure that they have gone through that fair use analysis. The faculty member is the person who best understands how this is going to fit and how they're going to use it and whether there's a fair use determination that can be made.

Q Now, at the end of the day, if all avenues of appeal, as we call it, or review are exhausted --

A Uh-huh.

Q -- is it your understanding that if a faculty member stands her ground and says, "I respect your view, I disagree" -- what happens? Who wins?

A Who wins? I would think that if the Office of Legal Affairs said, "We respectfully disagree with your determination," that the faculty member would lose in that case. Again, it would be on a case-by-case determination. There's very little way to make a blanket determination about that.

But I think certainly a component of this is our desire to help faculty understand what is going on in terms of fair use and that it is much more complex, that it is an educational fair use, which is what many faculty kind of blanket assume. So I think there would have been a huge teachable moment there.

Q As far as the process is concerned -- correct me if I'm misunderstanding the way it's contemplated to work at Georgia State University -- in filling out the fair use checklist, if the professor should have a question about the proper application to a given work or set of works, that professor will have access to resources, particularly in the Office of Legal Affairs, correct?

A Yes, in the Office of Legal Affairs and also on the Web site that has been put up that has a whole --

Q Yes.

A -- lot of supporting information.

Q Yes, I understand that.

A So yes.

Q That has to be actuated about the professor's own judgment about whether to seek out another viewpoint, correct?
A Generally, yes, but I think there could be prompting from both the library or from the Office of Legal Affairs that would suggest that they would go back and look at --
Q Well, I'm getting there.
A Okay.
Q I'm saying so at the first leg, at the point of --
A Yes.
Q -- filling it out --
A Okay.
Q -- it's up to me, Bruce Rich, professor of sociology, whether I feel comfortable enough with my fair use judgments to simply fill out the sheets or, instead, to seek some guidance, correct?
A Yes.
Q Okay. After I've made -- let's assume I've made my judgment without any other intervention --
A Uh-huh.
Q -- requested and then I present it as we've discussed --
A Uh-huh.

Q -- the remaining, but only remaining avenue of review, as it were, would be when that intake person, yes, ranging from high school educated to postgrad degree --
A Uh-huh.
Q -- were to flag an item as being potentially problematic; is that correct?
A Yes.
Q Okay. So if it makes it past that first point of processing, this is all I'm trying to establish --
A Uh-huh.
Q -- there is no other point contemplated in the process for another look at those fair use determinations; is that correct?
A To reinforce the point that I've made, the person who is best able to make the determination is the faculty member.
Q I understand that. Now, I think you may have testified to it, but I've lost the thought, which is, where does the scanning actually take place? And maybe we didn't get there.
A It -- I'm not sure we got there.
Q Okay, we didn't get there.
A So there is the paper copy of the

material --

Q Yes.

A -- and in the library --

Q Yes.

A -- a scan will be made.

Q Okay. And is there presently existing equipment that will continue to be used for that process as there is today with current E-Reserves?

A Yes.

Q Is that equipment owned by GSU, leased by GSU?

A I'm assuming it's leased by GSU, but it could be owned, yes.

Q And when those leasing arrangements are negotiated, who handles those within the university?

A I have no idea.

Q Who is responsible for maintaining the equipment, the scanning equipment, and making sure it's functional at any one point in time?

A With some of it, we have contracts with people who do come in. In some cases, we do not have contracts, and so we do it on a case-by-case basis in terms of whether we need to do in-house repairs or whether we would call out for someone.

Q And when you use the "we" in this --

A This would be the library.
Q The library?
A The library, yes.
Q Ultimate point of supervision of all of that, although I realize you're not there turning the widgets, is you, correct?
A Yes.
Q The buck stops with you?
A Yes.
Q Okay. And so you have this scanning equipment right on premises in the library --
A Uh-huh.
Q -- through which the hard copies are converted, yes?
A Uh-huh.
Q Into PDF format files?
A And other formats.
Q And other format.
A Yes.
Q What are the other available formats?
A Well, if it's a print document, it would probably be a PDF file. If it's another kind of document, it could be a JPEG or it could be a TIF file or something like that. It would depend on what the -- best suits the materials that we're making

available digitally.

Q Who makes the judgments as to format?

A The person who is doing the scanning.

Q Okay. And who actually does the scanning? Is that someone with any special technical or other expertise?

A Largely undergraduates.

Q Okay. And -- all right. So now we have some materials that are scanned.

A Uh-huh.

Q Where do they reside at that point in time?

A On a server -- ultimately on a server. I'm not familiar enough with the process to know whether there's an intervening step where they would be on a hard drive of a cache machine or whether they get immediately saved to a server. But they would be placed on a server to be made available.

Q Which is located where?

A In the computing center.

Q Of?

A The campus.

Q The campus?

A The campus.

Q Okay. Now, at some point, course pages, so-called, are created; is that correct?

A When a faculty member has materials that are to go on reserve, yes, a course page is made for that course.
Q Can you just describe that process, how that works?
A It's identifying the course, the number, the section, the faculty member.
Q And how is it actually created? Is this, again, an electronic document that appears only online?
A It would be a Web site --
Q A Web site?
A -- yes.
Q Specific to a particular course, which then --
A A particular course and a particular section of a course.
Q Fine, okay. And now, how do we sort of complete the steps of getting students enrolled in the courses able to access those course pages and ultimately access the material which is done through this process?
A Uh-huh. The faculty member is provided with a password to that course page, and the faculty member then distributes the password to the students

enrolled in the course and they then have access to that course page.

Q And I think we discussed earlier and looked at some documents about the techniques of which the students could access --

A Uh-huh.

Q -- store, display, print, as it were, the various materials, correct?

A (Witness nods head affirmatively.)

Q And that aspect of the process, I take it from your earlier answer, is not likely to change with the advent of the new policy, correct?

A Not the implementation, how the students implement it, no.

Q Right. Right. Now, we talked a bit about that red-flag screening. Up until the new policy was promulgated, was there an analogous red flag or other screening for E-Reserves determinations of the type that are reflected in Plaintiff's Exhibit 20?

A I don't know.

MR. SCHAETZEL: Objection as to form.

MR. RICH: Okay.

THE WITNESS: I don't know.

Q (By Mr. Rich) You don't know. Has it ever come to your attention that there was any disagreement at any level as to the propriety of a given E-Reserve listing as a matter of copyright practice, putting aside this lawsuit?

A I don't know.

Q None that come to mind?

A No.

Q And none that have reached your desk?

A No.

Q By the way, have you ever taught during your career?

A I'm sorry?

Q Have you ever taught during your career, taught any classes?

A I have.

Q What areas?

A I taught a one-semester, one-credit-hour course at the School of Library and Information Science at the University of Iowa.

Q Was that one time taught or one course --

A One time -- one time, one course.

Q What level of students were you teaching?

A Graduate students.

Q Graduate?

A Uh-huh.

Q Have you any plans to do any teaching while at GSU?

A No plans.

Q Who do you report to?

A The provost.

Q His name is, for the record?

A Ron Henry.

Q If it were to come to your attention while this new system is operating that somehow, for some reason, materials were posted that there can be no serious dispute in your mind should not have been posted on E-Reserves, for whatever reason, what is the process for taking those down out of the system?

A If that came to my attention, I would ask the staff person to remove them, would notify the faculty member, and would probably also notify legal counsel.

Q Are you aware of any instances during your tenure at GSU where, for whatever reason, copyright or otherwise, materials have had to be removed from the system?

A I'm not aware of any.

Q One second, please.

A variation of the last scenario, if a student is, say, suspended during an academic term or otherwise drops out of a course -- two examples -- does there exist the capability of locking that student out from access to the course materials to which he or she otherwise was given access by password?

A I believe it would depend on whether or not the student had been dismissed from the university versus dropping a course versus -- I'm trying to think of -- there are about three or four different scenarios, and I think some of them, you would automatically lock them out of everything having to do with the university; and in others, it would be something that would be a little bit harder to do technologically.

Q What is the practice, to your knowledge, to date, with respect to students who simply drop courses, in terms of having continued password access to E-Reserve materials for those courses?

A I don't know.

Q Is there a proposal in place for how that situation will be dealt with going forward?

A Not to my knowledge.

Q Do you have a view as to what the best practice would be?

A Certainly a component of it would be

whether or not a student was accessing the syllabus and the password through the course management system, in which case they would automatically not have access to that course through the course management system any longer. So if that is a practice that we're seeing, and I believe it is something that we're seeing increasingly, then they would -- we would very effectively be limiting their access to the materials.

MR. RICH: May I hear that answer back?

(Record read.)

Q (By Mr. Rich) Describe "accessing materials through the course management system."

A A course management system is an electronic framework for delivering quizzes, chat, course discussions, syllabus, that most campuses are using. I know that Georgia State University does use a course management system.

I also am aware that students are increasingly asking for access to materials through course management systems, and so I'm thinking that probably we are seeing an increased use of those for most courses. I believe that most, if not all, courses that are offered, a course management system site is established for those courses. I'm not going to swear to that, but I think that's the case.

Q Does the new copyright policy apply with equal force to course offerings made available through individual faculty Web sites or through the course management system outside of the library E-Reserves system?

A Fair use is fair use. It doesn't matter what they're using materials for, of course.

Q The answer is yes?

A Yes. It also applies to situations outside of teaching. I mean, we're talking about the instructional uses, but it applies generally.

Q What red flag review is available if I, as a professor, decide not to bring my ERes material to the reference desk or the reserve desk, but rather to post it through some other Web site which my students can access?

A There's not the same red-flag mechanism in place.

Q Is there a policy that indicates that one versus another channel for posting electronically such material is the acceptable practice at GSU?

A Not to my knowledge.

Q What would be the variables that you would think would influence an individual faculty member's decision as to the method by which he or she makes the materials electronically available to students?

A Though certainly not definitive, I would think one of them would be a comfort level with technology.

Q Because the scanning and all would need to be done other than through utilizing the resources that the library makes available?

A And all of the management of the materials and how you would upload them onto a server and naming protocols and all of that kind of stuff.

Q Now, just so I'm clear from a couple of answers ago, what is it you were mentioning was an increasing practice with --

A The use of course management system by faculty members and students.

Q And do you -- what do you attribute that to?

A Demand by students to have the materials available electronically.

Q But then if that demand could be as easily fulfilled by using the ERes system supervised by the library and operated by the library, why would it matter? What am I missing, in other words?

A Because there's a whole lot more to a course than their supplemental readings. A course management system allows -- I'm trying to think of all the variables. It allows the posting of grades, it allows test taking, it allows chat functions. I'm missing some, but they're very, very complicated systems that actually can be used completely for distance education -- I mean, if you chose to go into that way -- but also can be used to just complement the materials that you're doing in a face-to-face setting.

Q Who are the principal vendors of the GSU course management system? Is it Blackboard?

A I believe it's Blackboard.

Q Now -- so I'm a tech-savvy professor --

A Uh-huh.

Q -- in this case, it can't be Bruce Rich, but assume I were, and I decide that I like all the bells and whistles that could accompany my own site and all these other things that I would like to offer my students in one place, easy, and I've got this body of material. Now, under the new policy, am I still required to fill out a fair use checklist with respect to every item, even if I'm not offering it up through the ERes system?

A Yes.
Q And what is your understanding as to where copies of those filled-out forms are supposed to reside?
A My understanding is they reside with the faculty member.
Q Is there any plan on the part of GSU to have a central repository for all such filled-out forms?
A Not to my knowledge.
Q So that doesn't get me off the hook as a professor, in other words, I still have to go through the same exercise no matter where the materials will be electronically posted, correct?
A Yes.
Q Okay. However, again, just so I'm clear factually, if I decide to undertake the technology steps that are involved on my own, then by definition, I don't present it to that first-level person at the desk who might have that red-flag review opportunity, correct?
MR. SCHAETZEL: Objection as to form.
MR. RICH: Objection?
MR. SCHAETZEL: As to form.

Q (By Mr. Rich) You can answer.
A And the faculty member, again, is the person who can best determine this regardless of whether there's a red-flag person or not. I mean, they're the ones -- the clerical person seeing something is -- I mean, it's important, but it's not that important in the whole process. It's the faculty member who is the one who knows how the material is being used in the course. They're the ones that best understand how to make the fair use determination.
Q So the matter of overall copyright compliance, is it a matter of no consequence of the manner in which these materials are posted, that is, on the one hand, through use of the course management system, let's say, versus through the library E-Reserve system?
A As long as those are the two options that are -- that you're positing, I think there probably is not a whole lot of difference.
Q And with respect to access to materials on course management systems, is it the case or is it not the case that, again, practice has been that it requires passwords for students to access those materials?

A Yes.

MR. RICH: I think we're out of tape, so we'll take a little break.

THE VIDEOGRAPHER: Off the record at 2:11:48.

(Recess taken.)

THE VIDEOGRAPHER: This is Tape 4. We are back on the record at 2:24:52.

Q (By Mr. Rich) Under the new policy, how long are professors going to be required to retain copies of their filled-out fair use checklist?

A I don't know.

Q What is it proposed -- what is proposed to be done if a professor, after a given academic term, leaves the institution? Where -- is he supposed to maintain his checklist and take it with him or leave it behind at the university or what?

A I don't know.

Q Looking at the preexisting E-Reserve system, have you been made aware of a single instance in which a request by a professor to post materials to E-Reserves has been turned down on copyright grounds?

A No.

Q How important is it to students attending

Georgia State University to be able to obtain materials via the E-Reserve system free of charge?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: I don't know.

Q (By Mr. Rich) Do you have a view as to what the impact on Georgia State University would be if permissions fees were paid with respect to an increased percentage of works which today claim fair use protection?

A Yes.

Q What is your viewpoint?

A My viewpoint is that the materials would not be used, but that rather than go through the process of investigating this, figuring out what was -- what needed to be done, paying the fee, the faculty member would just decide not to use the supplemental materials.

Q And built into that assumption is that there would or would not be funding resources made available by the library?

A I think that's almost irrelevant to the question. I think it -- it just -- I don't think it would happen because faculty members would choose not to provide the supplemental materials.

Q Now, your answer assumes that such offerings are, in fact, supplemental offerings, correct?
A Yes.
Q To the extent it were to be the case that some or, in some cases, all of the course offerings were required readings, I take it you would have a different answer as to the impact of paying permissions fee?
A We have a mechanism in place to address that through coursepack, so it would just be moving things to the coursepacks.
Q And would there be any reason, mechanically or economically, why if the same materials as constitute a paper coursepack constitute the equivalent electronic coursepack, that the same levels of permissions fees would be, for any reason, less suitable --
MR. SCHAETZEL: Objection as --
Q (By Mr. Rich) -- or more objectionable? Let me rephrase. Poorly phrased --
A Please.
Q -- question.
A Thank you.
Q Based on your knowledge of many years as a

librarian in this setting, do you have any reason to believe that paying equivalent levels of permissions fees for electronic coursepacks as are already paid for paper coursepacks would have any detrimental impact on GSU's operations?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: So there are electronic coursepacks that students can buy, so faculty members create a coursepack, it is a required reading, and all the material is -- is made available electronically. So I think if you're talking about coursepacks, paper versus electronic, it's still a coursepack. And that is separate from E-Reserves, whether it's in a paper format or in an electronic format.

Q (By Mr. Rich) What's your knowledge of the extent to which licensed electronic coursepacks are offered to GSU students?

A I don't --

MR. SCHAETZEL: Objection as to form. Go ahead.

THE WITNESS: I don't know.

Q (By Mr. Rich) Do you have any idea

whatsoever?

A No.

Q Can you identify even a single such offering that's currently licensed?

A Not at GSU, no.

Q Do you discern -- well, let's assume that a paper coursepack for which permissions have been sought comprises 10 articles from scientific, technical, or medical journals, and it's bound -- velo bound together and it's made available either at the university copy center or at an off-campus copy shop, and a permissions fee of, I don't know, let's just make this up for the sake of my question, $20 is charged for all of the copyright rights. Can we agree that sort of practice occurs today, correct, as far as you understand it?

MR. SCHAETZEL: Objection as to form.

Q (By Mr. Rich) Required reading.

A Required reading, that there is a fee involved, I don't know what the --

Q Okay. Let's assume that same professor prefers his students, for required reading, to access those very same 10 journal articles, and so he goes through this same process here, okay, but decides, consistent with the practice on the paper side, that permissions ought to be sought for those 10, all right? And let's assume those permissions would come to the same $20, okay? Is it of any different consequence, from the standpoint of the interests of GSU, whether permissions fees are charged simply because in one case the materials are being offered in paper form, and in my other example the same materials are being offered in electronic form?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: It's still material that is required for the course, so it's irrelevant.

Q (By Mr. Rich) It's irrelevant from the standpoint of the institution, correct?

A Yes.

Q Now, in that example, exact example I gave you, if that professor instead decided that because the works were being offered on the E-Reserve system, he could treat it as something other than a coursepack, even though it's the identical reading material and it's just because it's not velo bound, but it's offered as individual files on E-Reserve, do you believe that's a valid basis for making a different fair use determination, required reading?

A No.

MR. SCHAETZEL: Objection as to form.

THE WITNESS: Not if it's required reading.

MR. RICH: Okay, I think I repeated myself on that from earlier. Thank you.

Q (By Mr. Rich) Do you recall how you came to be involved in the committee that generated the new policy?

A Yes.

Q How did that happen?

A I received a call from Burns Newsome asking me if I would be willing to serve on that committee, and then that was followed by a letter from the chancellor appointing me to the committee.

MR. RICH: Let's mark that chancellor letter. Is this 22? Mark as Plaintiff's Exhibit 22 a document, I believe, just produced by defense counsel yesterday. It doesn't yet have a Bates number, but it's a 10/27/08 e-mail from Burns Newsome to Nancy Seamans.

(Exhibit 22 marked for identification.)

Q (By Mr. Rich) Is this the formal

invitation that you referred to?
A No. I have a letter also from the chancellor.
Q Do you believe it's the same -- that it's the same text?
A The chancellor's letter was much shorter.
Q Was much shorter?
A Yeah.
Q I'm sorry, this is from Mr. Newsome.
A Uh-huh.
Q Yeah, okay. You're right. I'm getting tired as well.
In the conversation with Mr. Newsome, what did he describe the purpose of this committee to be?
A To review the existing Regents Guide and to create a policy for the USG system for copyright in an educational setting.
Q In the e-mail in front of you, Mr. Newsome writes in the second sentence, "As you know, the Board of Regents Guide to Copyright is a central part of the lawsuit filed by the publishing industry against the Board and Georgia State University." Do you see that?
A Yes.
Q What did you understand that to mean?

A That the Board of Regents had been included in the lawsuit and that that was reflected in terms of how we would look at the policy and the guidelines.

Q Did you understand Mr. Newsome to be of the view that a central element of the lawsuit was a set of guidelines as opposed to a set of practices at Georgia State University?

A So -- can I ask you to repeat the question?

Q Of course. Did you understand Mr. Newsome to suggest that the -- a central aspect of this case was a set of written guidelines, as opposed to actual practice, in terms of copying under the auspices of E-Reserve?

A They're inextricably linked because the practice was based on the guide. So I don't know -- I'm not sure what you're asking me to differentiate between.

Q What knowledge do you have as to what dictated actual practice by individual faculty at Georgia State University during the time when you had not yet arrived at Georgia State University?

A None.

Q Just supposition on your part?

A Right.

Q What did you understand Mr. Newsome to have in mind when he writes, "Given that the Regents Guide is more than 11 years old and does not contemplate many of the digital technologies available to research libraries, we believe it is time to revisit the Regents guidelines"?

Did you have an understanding, either from this or from your conversation with Mr. Newsome, what he had in mind by many of the digital technologies available to research libraries not having been contemplated by the other guideline?

A My understanding from my conversation with him was that the guide was dated because it did not take into consideration the way -- the different ways of delivering accessed materials that are now available to us.

Q Did -- do you have any such different techniques in mind, namely what's available now from what was contemplated in 1997?

A Personally, my sense of this? We're talking from -- about going from a paper environment to an electronic environment, where, I mean, reserves, as I used them, were you walked into the library and you went to the shelf and you pulled a piece of material off the shelf and you used it in whatever way you chose to, including copying it, and that no longer is the only way we can make materials available to students.

Q But neither was that the case in 1997; isn't it true?

A '97 was still a largely paper environment for reserves, I would guess. I'd have to go back and look, but...

Q Did you ever have occasion to sit and read the old Regents Guide?

A Not in any detail, no.

Q I'll represent to you that it talks about electronic reserves and good copyright practice with respect to electronic reserves. It makes specific reference to the need to be cognizant of new technological means and electronic means of delivering content.

Does that ring a bell with you in terms of it really addressing some of those matters?

A But not in any way the way things have changed in the 12 years since those were written.

Q Do you have any --

A The environment has changed in those 12 years.

Q And could you describe a little bit from your own experience how the environment has changed?

A I think, from my own experience, the sense that there is a student expectation in terms of where they get their material, their willingness to use materials that are print-based versus their willingness to use ones that are electronic, access in terms of a 24/7 model rather than a limited by the library hours model.

I think probably as much as anything, it's a -- in terms of scale, that they were -- we were beginning to see the electronic access being made available 12 years ago, and now it's just pervasive.

Q And at a very broad level, do you have a sense of what the implications of those trends for copyright law and copyright and fair use ought to be, or is that too broad a question?

A I think that's too broad a question.

Q Okay. Did you understand the mission of the committee, at least when it was organized, to add refinements or amendments or addenda to the old guidelines rather than place them altogether?

THE WITNESS: I don't think that was explicit. I think it was that we have these existing guidelines and that we need

to review them and find out where it is we
go next. And it was up to the committee to
make that determination.
Q (By Mr. Rich) Did you know any of the other committee members from prior involvements?
A I had certainly met Bill Potter because he is a peer and a colleague. I had met Cynthia Hall because she was on campus. I think that's it.
Q Do you remember any particular member of the committee standing out for his or her contributions, insights, putting esteemed legal counsel --
A Not particularly, no.
Q How would you describe Mr. Potter's role in terms of substantive contribution?
A He was a very good facilitator of the process, and he certainly had the knowledge of the process from the guide, the -- the development of the guide in '97 because he had been part of that process also.
Q How would you describe how active a role you yourself played in the process?
A On a scale of 1 to 10, a 4, because part of it was being new to Georgia, being new to the old guide, being new to this process.

For the first six weeks, I'm thinking, I probably was more an observer than anything else and in that time was kind of hearing how the guide had been developed, how that affected where we were going with the new policy. And so probably there was less participation from me than I might normally have done just because I was new to the whole thing.

Q What time constraints did the committee believe it was operating under?

A The need to be done expeditiously.

Q What was your understanding as to the reason for that?

A That if you give a roomful of academics an unlimited time frame, they will take it, and that I think Bill felt the need to have a deadline in order to not let this go on for the next year or two, which I think it could conceivably have done.

Q That is, the process go on?

A Right.

Q Did you sense that there was some sense of urgency with putting processes in place that would ameliorate some, at least, of the complaints lodged by our clients in litigation?

A Not necessarily.

Q But not necessarily not, either?

A Right. I think that was certainly a consideration, but not a primary one.

Q And just again, at the risk of having to repeat -- we'll try not to do that too much today -- what would you say the primary consideration for the committee was?

MR. SCHAETZEL: Objection as to form. Asked and answered.

THE WITNESS: To review what was in place and to try to bring it into the 21st century.

Q (By Mr. Rich) Do you think the committee succeeded?

A I do.

Q How would you characterize the variety of viewpoints that were bandied about during the process before the final set of papers were written?

MR. SCHAETZEL: I'm sorry, could you read that question back? I didn't...

(Record read.)

MR. SCHAETZEL: All right. In other words, without --

MR. RICH: I'm not asking --

MR. SCHAETZEL: I understand, I think, the distinction you're trying to draw, but

I would caution the witness, to the extent that you can do that without disclosing the communications -- the question, I don't believe, is intended to ask for the nature of the communications, but rather how one would describe --

MR. RICH: How diverse it was. Thank you.

THE WITNESS: Because of the nature of the people sitting around the table, it was very diverse. There were certainly faculty perspectives, there were administrative perspectives, there were library perspectives and legal perspectives, so it was quite broad.

Q (By Mr. Rich) And at the end of the day, putting legal perspective to the side because I don't want to intrude on it, did one set of perceptions, in terms of one set of perspectives, tend to dominate the ultimate outcome, in your view?

A In my view, yes.

Q And how would you describe that?

A The need to provide the best educational opportunity to students that we possibly could within the constraints of copyright law.

Q Was that a controversial proposition?
A No, but it took a while to get to that because you get distracted by so many things that are being discussed.
Q Did you receive -- did you attend all of the -- each of the committee meetings?
A Yes.
Q How many were there?
A I don't recall, but I believe five.
Q In person or in person/conference call?
A Five in person and then there were several conference calls in addition to that.
Q Okay.
A Could have been four, could have been six.
Q And was it Mr. Potter's practice to send out summaries of -- of each of those meetings at their conclusion, following their conclusion?
A I know he summarized at the end of each meeting, and I'm sorry, I don't recall whether he also followed up with e-mail.
Q Do you recall any noncommittee members attending the meeting, other than counsel for the university or for individual units of the university?
MR. SCHAETZEL: Objection as to form.
THE WITNESS: No.

(Discussion off the record.)

Q (By Mr. Rich) I'm going to show you a document that's been previously marked as Plaintiff's Exhibit 15.

MR. RICH: And we'll hand out clean copies for whoever needs --

MR. SCHAETZEL: Thank you.

THE WITNESS: Uh-huh.

(Discussion off the record.)

Q (By Mr. Rich) Do you recognize what's being previously marked as Plaintiff's Exhibit 15?

A Yes.

Q What is it?

A It is the fair use checklist that was created by the Regent Select Committee on Copyright.

Q I take it this is the document to which we've been referring on and off during the entire day, yes, the document to be filled out by individual faculty members?

A Uh-huh.

Q And am I correct -- is it your understanding that the way this process is to work, in respect of any given copyrighted work, the professor checks the appropriate boxes, weighs the outcome within each factor, and then sees if a majority of factors favors either fair use or weigh against fair use; is that correct?

A That's my understanding, yes.

Q And in the case of a 2 to 2 outcome, as it were --

A Uh-huh.

Q -- the preamble to this appears to indicate that in that situation, instructors should consider the total facts weighing in favor of fair use as opposed to the total facts weighing against fair use, is that correct, in terms of coming up with an outcome?

A That's my understanding.

Q And focusing on that, so now a professor has gone through this exercise and has a bunch of checkmarks throughout --

A Uh-huh.

Q -- what is your sense of the tools that the professor is supposed to use then to break the tie? How do you think the professor ought to be thinking about these things?

A In terms of resources, as opposed to tools, the resources certainly are all of the supporting information that has been made available on the USG Web site, where the checklist is available. In addition, there's also -- the Office of Legal Affairs on each campus is available, somebody is available to consult with. And then Mr. Newsome is also a resource. So I think there are a number of different ways one can proceed with this.

Q So are you suggesting that where it's a close case, you would expect that a number of professors will avail themselves of some one or more of those resources you just identified in making a decision?

A I would assume so, yes.

Q And presumably others will just make the decision from the face of this document, correct?

A I would assume so.

Q Did the committee -- apart from faculty members sitting on the committee, did the committee review any other University System of Georgia faculty to get their input on the feasibility of this process?

A No.

Q Okay. Did it do any tests or trials of it for a sample of materials, either that have been placed on E-Reserves previously or that might be future candidates for E-Reserves?

A That didn't seem to be something that was particularly productive because I think we felt that there is no way to know what the specific circumstances are in a course. So to my recollection, we discussed that, but we did not go through any exercise of looking at the sociology professor, for example.

Q If you look at the first factor, please.

A Uh-huh.

Q Among the listed criteria is the issue of whether the use is transformative or nontransformative. Do you see that?

A I do.

Q Do you have an understanding of that concept within the context of this exercise?

A I believe I do.

Q Please tell me what your understanding is.

A The example that's easiest for me to use is Pretty Woman and 2 Live Crew and the use of the music and whether it was a transformative use, and it was determined to be a transformative use. It's the example that libraries tend to use.

Q Bring that home to practice in terms of application to textual material.

A It would be taking a -- taking a piece of material and turning it into something that is a new work, having transformed it into something by adding additional material to that work.

Q I take it, from that conception, a straightforward photocopy or electronic copy of the identical work by itself and without more would not be treated as -- would not be treated as transformative; is that correct?

A That would be my interpretation, yes.

Q And if you stitched a series of those exact copies together into a compendium or anthology of works or a coursepack, I take it your view would be that also would not thereby transform all of that into a transformative work, correct?

A That would be my interpretation.

Q Okay. How would you expect that a faculty member would, in practice, make a determination as to the bottom left most factor and bottom right most factor, namely whether the proposed use is necessary to achieve his or her intended educational purpose? How would one go about making that judgment, do you think?

A They would be looking at the course that they are teaching, the content of that course, what is necessary to convey that content, and whether this piece of material, this piece of information is necessary in order to teach the students what they're intending to -- intending for them to learn in that course.

Q How narrow or broad a conception of "necessary" do you read into this? I mean, technically, there's probably no one piece of information that's necessary to teach a course, yet a slightly broader conception of necessity is, "Well, to achieve my pedagogical purpose, I need to have the students exposed to this essay or this interpretation of this historical event." How do you think about that?

A Again, I think -- what I think is irrelevant. It's the faculty member having to look at what they're trying to accomplish and what they're trying to teach the student, what they want the student to learn, what the outcome of the course is, and they're the ones that are going to have to make the determination.

Q So necessity is in the eye of the individual course-generating professor?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: Content is in the eye of the faculty member, yes.

Q (By Mr. Rich) But making the judgment as to the nexus between course material and the pedagogical purposes to be furthered is in the subjective judgment of the professor, correct?

A Certainly not in anyone else's hands, no. So yes, I agree.

Q And so conceivably if a course is on brilliant rhetoric and in order to achieve the objective, the professor determines that he needs to use the entirety of certain famous speeches, Daniel Webster, Cicero, you name it, because it's necessary to understand the concept of brilliant rhetoric to expose the student to the total construction of the piece and so forth, I assume it would be reasonable in that situation for the professor at least to conclude that using the entirety of the work is necessary to achieve the intended educational purpose, true?

A You have, however, the fact that you are requiring the student to read those, requiring them to read the whole thing in their entirety, which would suggest that it comes outside of this and goes in another direction.

Q Not within this factor, maybe within --

A Right --

Q -- a different factor?

A -- looking at it in the whole.
Q But looking at Factor 1 and saying -- just taking my fact scenario, you could envision in that situation a professor legitimately concluding, "I need to do that," yes?
A Uh-huh.
Q Factor 3 goes to amount and substantiality. The phraseology adopted in the first boxes across horizontally are small portion of work used and large portion or entire work used. Again, those seem to be capable of a fair amount of interpretation, is that fair --
A Yes.
Q -- the concept small and large?
A Yes.
Q And was that deliberate on the part of the drafters?
MR. SCHAETZEL: Would you read that question back for me, please?
(Record read.)
MR. RICH: Drafters.
THE COURT REPORTER: Oh, drafters. Sorry.
MR. SCHAETZEL: Okay. Let me ask -- there's a potential for that question to

raise the specter of attorney-client privilege, given that you're now asking for what the witness at least conceivably has been told by other drafters. By answering this question, are you willing to agree that we're not waiving the privilege?

MR. RICH: Yes.

MR. SCHAETZEL: Please answer the best you can.

THE WITNESS: Can you repeat the question?

MR. RICH: Go ahead, please.

(Record read.)

THE WITNESS: To say that there are two sides to this, yes.

Q (By Mr. Rich) No, to use words capable of as much interpretation as small versus large?

A Certainly so much of this is subjective that I think, again, it becomes to some extent irrelevant, yes.

Q When you say -- what is it that becomes irrelevant?

A The use of the -- all of this is a faculty member making their best determination as to how this fits the material that they're intending to use. So trying to give them something that is fairly explicit is -- I think was deliberate.

Q What tools of interpretation do faculty have, whether from the policy or other guidance, in terms of how to think about the concept of a small portion or a large portion?

A Certainly the whole list of factors that you're looking at because they are intertwined, and then, again, the resources that are available to them, if they choose to avail themselves of them, on the Web site, through legal counsel.

Q Well, for example, the -- one of the documents we looked at earlier that was a preexisting guidance on the Georgia State site indicated that works of one chapter or 20 percent or less would be accepted. Do you recall seeing that?

A I do.

Q And it appears that at least at that level, those concepts have not been worked into this checklist, correct?

A That's correct.

Q And I believe you earlier testified that in some situations, possibly more than 20 percent of a work could be warranted under a fair use analysis, correct?

A What I think I said was that I think it's impossible to put percentages on those --
Q Yes.
A -- that it can range from nothing to everything.
Q Yes. But what I -- my more focused questions really are, again, trying to understand, putting this in the hand of any of the 1200 faculty at GSU, how they are supposed to think about small portion. I think inevitably some will think in terms of percentages of the whole. I mean, if they come to Ms. Hall or they go to Mr. Newsome or somewhere else and say, "Can I use not more than X percent", what is the committee -- what is the committee's understanding about what they're likely to hear?
A It would depend on the course, it would depend on the content of the course, it would depend on what the faculty member was trying to accomplish in the course. And that's one piece of the amount of substantiality. It's trying to take this, Section 107, and give it something that people can understand in a more manageable way and using common practice to do that.
Q The next facts within -- or criteria within Factor 3 are "portion used is or is not central or

significant to the entire work as a whole." Do you see that?

A I do.

Q The heart-of-the-work concept. How do you envision a faculty member making that determination as to works they're not the authors of?

A I would assume that if they are teaching the course, they are familiar with the material that is relevant to that course, and so they would have a sense of that better than anyone else would have who would be determining whether or not it was a fair use of the material.

Q What is the intended meaning of the third set of criteria there, "The amount taken is narrowly tailored to educational purpose such as criticism, research," and then I'm particularly interested in "or subject being taught"? What is intended to be conveyed there?

A The idea that the material is specifically relevant and that the amount being used is targeted to the educational purpose trying to be accomplished in the course.

Q Strikes me, might you agree, that it overlaps a fair amount with an earlier concept we talked about under Factor 1, which is "use is

necessary to achieve your intended educational purpose" --
A And I think I --
Q -- similar in concept?
A -- made that point earlier, yes. I think it is very hard to take any of these in isolation. I think they're not intended to be taken in isolation, that there are four factors and it's the four factors that have to be analyzed.
Q Looking at Factor 4 -- actually, if you -- if you, the faculty member, determine that you prevail on three of the four, you don't really need to analyze all four, do you?
A Of course you do.
Q Why?
A Because you have to look at all four factors to see if there -- if it's a fair use. You might get to the fourth one -- you've got three that are in your favor and you get to the fourth one and you start realizing, "Hmm, that doesn't weigh in my favor," and it makes you question things that you decided previously.
Q So that you would recalibrate your judgments --
A You might recalibrate --

Q -- on 1 to 3?
A You might recalibrate your judgment.
Q But if you're very firm in your judgments as to 1 to 3, you say, "I win"? No?
A You still have to do the fourth one.
Q What's the penalty if you leave that one blank when you hand your form in, or you don't have to hand it in to anybody? Who's going to know?
A There is a -- faculty members want to do the right thing partly because they're also holders of copyright. They're not only using someone else -- I mean, in my opinion, I mean, they are people who also have created works that other people are using, and I think they want their works used appropriately, as well as they want to use other people's works appropriately.
Q I don't doubt that to be true to some extent, although you might agree with me, wouldn't you, that faculty members often have different motivations to be published than other authors do?
A Certainly.
Q How would a -- looking at Factor 4, how would a faculty member be in a position to discern the effect on the market or potential market for copyrighted work based upon the proposed taking?

A Again, I would speculate that a faculty member is in the best position to know that because they are aware of what is going on in their discipline and what the market is for the materials that are being published.

Q Are they required, in your view, to make some investigation as to, for example, whether there is a license available, through an organization like the CCC, for accessing the material that they wish to use?

A Are they?

Q Required to make that kind of --

A Required to make that --

Q -- investigation in assessing this factor.

A I think it would depend on whether they thought there was enough question in their mind that they should investigate that. But the fact that a license is available does not preclude fair use. The use could still be fair even if there is a license available, or at least that is my understanding of the law.

Q Sure, but looking at this factor, which is designed to measure precisely a displacement of income --

A Right.

Q -- it's a little circular to say that doesn't foreclose the fair use determination when that's an element you have to weigh in the determination to begin with, correct?

A It is one of --

MR. SCHAETZEL: Objection as to form. I didn't want to interrupt you.

THE WITNESS: Okay. It's one of four factors.

Q (By Mr. Rich) Sure. So I'm saying, how do you know, if you're a professor, whether you have impaired an existing viable licensing mechanism for some or all of the materials if you have made no investigation, you just say, "Well, nobody is going to be the worse off from me handing out 20 copies to my students"? Is that the level of investigation we're talking about here?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: That is assuming that a faculty member is not aware of what is happening in their discipline, and a faculty member, unless they are a brand-new one, is going to have a very good sense of what the marketability is of materials in their discipline.

Q (By Mr. Rich) Excerpts of materials?

A I would speculate that it would be all materials in their discipline, yes.

Q Down that left-hand column on Factor 4 is "licensing or permission unavailable." How is a faculty member going to ascertain that information?

A I don't know definitively, but some opportunities would be to contact the person who created the work, contact the library, use something like the Copyright Clearance Center. I think there are several different ways you could do that.

Q Would you expect that it would be proper practice for faculty going through this checklist to make that kind of investigation before completing the checklist?

A I think it would be up to the individual faculty member, as they weigh all of the factors, to decide whether that's one that bears further investigation.

Q What expertise do they possess to determine which factors should be viewed as significant versus other factors?

A The expertise of their discipline, their awareness of the course, awareness of the educational purposes of the course, the need for material to support their teaching.

Q Most of which would tend in favor of making a fair use determination, would they not?

A I think it would depend on a case-by-case basis how they go through it. I don't think you can generalize that, no.

Q Under what analysis would a faculty member, all other things equal, feel himself or herself benefiting from putting him or herself or GSU the burden of getting permissions for the materials they want to use in their course?

A Because it's the right thing to do. It's a legal and ethical issue that -- I mean, academic integrity requires that.

Q And what enforcement mechanisms are proposed within GSU to make sure that the policies are being properly implemented by individual faculty members?

MR. SCHAETZEL: Objection. Asked and answered.

THE WITNESS: Enforcement is -- there's not an enforcement mechanism. This is a -- this is a -- we teach the faculty, we give them the tools that they have, we try to make sure it doesn't happen. But there are no copyright police out there beating up on people if they make the wrong determination. I mean, this is something where a faculty member has to process all of this. It is a learning process, as they do it for each piece of material that they're using.

Q (By Mr. Rich) So you seem to think that it's a pejorative to enforce copyright laws, that it's --

A I have not said that.

Q You used the word "copyright police."

A You're asking about enforcement --

Q Yes.

A -- how is it going to be enforced.

Q Yes.

A There is a difference between making sure that people have the tools to do their job and making sure that they make their best determination, and then it's being proactive versus reactive.

Q If students cheat on examinations, are there any consequences to their career at GSU?

A Yes.

Q What?

A At the worst end, they can be dismissed from school.

Q It violates the code of conduct for them to cheat, doesn't it?

A It does.

Q They're expected to act appropriately, correct?

A As are faculty members --

Q And if --

A -- in terms of using materials appropriately in their teaching, yes.

Q If faculty members plagiarized, are they subject to discipline?

A Of course.

Q What would be the discipline?

A Would depend on how it's happened and how it gets addressed. I don't know the --

Q What could be the range of --

A The ultimate could be that they are dismissed.

Q What other acts by faculty could lead to discipline at the university level, in your experience?

A Misappropriation of funds, inappropriate relationships with students. There are a number of them.

Q Yes. And those all violate norms of conduct, correct?

A They violate norms of conduct and law.

Q But if they violate norms of conduct and copyright laws, there is -- there are not going to be any copyright police; is that correct?

A You're putting words in my mouth. What I have said is that there are -- there is every effort made to allow -- to give the tools to the faculty member and allow them to make the determination. How we enforce -- to use your word, enforce that, is something that we just have not put into place at this point, and I don't know what that would be.

Q Well, that's a slightly different answer than your prior answer, which was, "We don't intend to be copyright police."

MR. SCHAETZEL: Objection as to form.

THE WITNESS: And the "we" at that point that I was referring to -- and I'm sorry, I was not explicit -- was the library, the library will not be the copyright police, no.

Q (By Mr. Rich) Let me be more clear, then, with my question.

A Okay.

Q Do you believe there will be university-based enforcement mechanisms, whether legal or the chancellor level, to enforce compliance with the new policies?

A I do not know. They're presumably will be consequences for flagrant violation of any policy in place on campus.

Q And given the current structure for E-Reserves, how would such flagrant violations come to the university's attention but for the high school student, to post Ph.D. candidates, sitting at the reserve desk flagging it?

THE WITNESS: No, not you?

MR. SCHAETZEL: Not me.

THE WITNESS: As we've already talked about, I think that there is the red flag that is going to be raised by that person. It gets bumped to someone else to determine and ultimately gets bumped to legal counsel to determine.

Q (By Mr. Rich) Are you of the view that everything that the faculty member needs to evaluate is embedded in these four factors, that is, everything necessary to a fair use evaluation?

A That is certainly my understanding of Section 107, that that does cover the four fair use factors, yes.

Q Another element of the policy, and I can show it to you if you care -- I'm trying to save a little bit of time at this hour --

A Uh-huh.

Q -- indicates that the four factors are nonexclusive, that there can be other factors that can bear on a fair use outcome, does that sound familiar?

A I think if you look at 107, it does address that.

Q Yes.

A Yes.

Q How does the checklist deal with that fact, deal with that recognition?

A If you look at the directions for that, I believe it kind of points people towards the legal office if they have questions beyond what they think is being covered by the four fair use factors and the checklist.

Q But if you're not initiated in copyright law at some level, you wouldn't necessarily know what

those other factors are, would you?
A No, but you certainly have the tools available to find that out should you choose to. And I believe that we have provided, certainly, the common understanding of how faculty members are determining fair use throughout the United States and how they use materials.
Q What is the RACL?
A The Regents Advisory -- no, Regents Academic Advisory Committee on Libraries, Regents Advisory Committee. It's a library group of regents institutions.
Q Are you a part of that?
A I am.
Q And my limited question there is: What role, if any, did that group of people have in the formulation of the new policy?
A To the best of my knowledge, none.
Q They were given an advance courtesy copy; is that correct?
A Yes.
Q Okay.
A Because those would be the institutions that would be having to implement the policy once it is approved.

Q We are getting there.
A I'm fine.
(Discussion off the record.)
MR. RICH: How are we doing on time? Why don't we take a short break, okay?
THE VIDEOGRAPHER: Off the record at 3:19:42.
(Recess taken.)
THE VIDEOGRAPHER: This is Tape 5. We are back on the record at 3:33:51.
(Exhibit 23 marked for identification.)
Q (By Mr. Rich) The reporter has placed before you the next exhibit, which is Plaintiff's 23, which is a document without Bates numbers, but produced by the defendants, I believe were taken off the Web site, the lead page of which says "Course Reserves," and ask you if you're able to identify this exhibit.
MR. SCHAETZEL: Do you have a copy for us?
MR. RICH: I'm sorry.
MR. SCHAETZEL: This is exhibit which now?
THE WITNESS: Twenty-three.
MR. SCHAETZEL: Thank you.

THE WITNESS: It doesn't have the
Georgia State University logo on it, but I
believe it is part of the Web site for
course reserves.

Q (By Mr. Rich) You understand this to be a recent addition to the Web site as well?

A I believe it is.

Q And is it designed to reflect the work of your committee and the resulting policy?

A As it references that policy, I believe it does, yes.

Q And who is the author of these -- of this Web site material?

A I believe, again, the same people who were doing the Web page that we talked about before, so it would be the folks in the E-Reserve unit, plus the supervisor of that unit, plus Laura Burtle, plus me, with some input from legal counsel, I believe.

Q Have you personally received any feedback from anyone in the GSU community to any of the recently posted materials or to the policy?

A Not yet.

Q Do you expect to be deluged?

A Not deluged, but I expect to hear things, yes.

MR. RICH: Let's mark next the amended complaint in this action, first amended, Plaintiff's 24.

(Exhibit 24 marked for identification.)

MR. RICH: Thank you.

Q (By Mr. Rich) I'm actually not going to ask you any questions about the body of the document, but rather only relating to one of the exhibits to it. But I'll ask -- I'll represent to you that this is a copy of the amended complaint filed in this action.

If you would turn, please, to Exhibit 1 towards the back, "Schedule of Works." Prior to today, have you had a chance to review that schedule?

A No. I've seen it, but I have not looked at it closely.

Q I'll represent to you that these are works of the three plaintiffs to this action, Cambridge, Oxford, and Sage, which serve as examples for the kind of practices to which our clients object in this lawsuit. And we provided a few samples to gain your reaction to them.

And why don't we begin with -- on page 1 of the schedule, the bottom row, there's a book called Focus on the Language Classroom." And the two excerpts taken from that by the professor of the course called "Practicum" in the fall of 2007 were Chapters 9 and 10, which we'll jointly mark as the next exhibit number.

(Exhibit 25 marked for identification.)

MR. RICH: I'm going to mark, although we don't have multiple copies today, but we'll have the reporter -- we'll provide the reporter with a picture of the cover of the work from which these chapters were taken, namely the hard-cover version of Focus on the Language Classroom, Cambridge University Press, and I'll mark it as an exhibit, which, again, we'll put a place holder in for now and provide copies of the title page, but it's a resource available to you as we discuss it now.

What number will that be?

THE COURT REPORTER: Twenty-six.

MR. RICH: That will be Plaintiff's 26.

Q (By Mr. Rich) What I would interested in, recognizing and accepting the fact you are not the faculty member who selected these materials, nor is this your area of expertise, I'm interested in using this and perhaps one or two other examples as illustrative of the way you, from your committee experience here, would anticipate a faculty member thinking of using these excerpts from this work, how you would anticipate that he or she would go through this checklist exercise, as far as you're able to take it. And if you're unable in places, I'm sure you'll say to me, "I can't make the judgment," but I think if we can use this in a dynamic exercise in a few examples, we at least could find that helpful.

And so if you have the checklist in front of you, and again, the premise is that the professor in this class is proposing to take two chapters out of what I believe are 11 chapters in all -- you can look at the table of contents in this book -- for use in this course. And so what are you able to offer and what are you unable at this point, without more information, to offer as you course through the checklist? Take your time.

A Go back to my paper here. So since this is not owned by my library, for starters, it wouldn't make the first cut. Can we stop there? It's owned by Emory.

Q Fair point.

A Okay. Are we over?

Q Let's -- that's very -- very well done.
A You're not going to let me get away with that one, are you?
Q Let's change that.
A Shucks.
Q This comes off --
A Okay.
Q -- the professor's collection, okay?
A All right.
Q That was a very good catch, however.
A All right. I have to go back through my papers. Because it is for a course -- and I am going to qualify this. This is -- I am doing this blind, I am extrapolating --
Q Absolutely.
A -- what I can from this. I am not the faculty member. I am not teaching the course.
Q Understood.
A You know all of that.
Q Understood.
A But based on what I'm seeing here and here, I would say that I would be fairly comfortable that it is a nonprofit educational use.
Q Yes.
A I am not sure that I would be willing to

check that it is a teaching use, because if it is for a practicum, that's kind of a different kind of teaching. It's one that I would probably kind of have to think about there.

Q Could you, for the uninitiated, describe what a practicum is?

A I am guessing, again, that since this is -- and I don't know what the numbering system means, but it's a graduate class of some sort, I am guessing, that would be putting a teacher in a classroom setting, so probably a language arts teacher --

Q Okay.

A -- in a classroom setting.

Q Okay.

A So I'm not sure how we would do the --

Q Okay.

A -- teaching aspect of that. I would say that it is probably not research, but might be counted as scholarship. It is not criticism, it is not comment, news reporting, or parody. It is not transformative, it is not personal study. I don't know about the use necessary to achieve the intended purpose.

Q Okay.

A It is not for a commercial activity. I don't see a place where somebody is profiting from use of this. I certainly would not think it would be for entertainment, though one never can tell. It is nontransformative. There does not appear to be a publication that would take place here. This would not be public distribution. And again, I don't --

Q Yes.

A -- know the use --

Q Yes.

A -- piece. So at that point on this one, we would be saying nonprofit. We don't know about --

Q Possibly research or scholarship?

A Possibly that one.

Q And possibly the last?

A And possibly the last. And on the opposite side, you would be possibly the last. So in that case, I would say it would favor -- the factors favor fair use.

Q Okay.

A It is a published work. It is, I'm assuming, factual, certainly nonfiction.

Q Right.

A And again, the question about important to educational objectives, I would have a hard time knowing. So that means that it is not unpublished, it is not highly creative, and it is not consumable. So again, I would say that in this case, factors favor fair use.

Small portion, that's something that I would have a hard time deciding in terms of kind of kind of how it weighs against the whole work and how it's used in the classroom setting. So I would probably --

Q Well, if the work is about 220 pages and this is maybe --

A Two chapters.

Q -- 35 pages, it's about roughly 15 percent. Does that affect your thinking?

A Not really. I mean, it's kind of whether it's -- it's how it plays into the rest of things. I would maybe even come back to that one --

Q Okay.

A -- in order to fill it out.

I don't know enough about this work to know whether the portion used is central or significant to the work, so I would have to spend some time during that analysis in a different kind of way. And again, I don't know what the educational purpose is, so I'm not sure how this is being used for that class.

I might, given what you're saying, check here the large portion being used; but I think, again, it would depend on how we would -- we would determine that in the context of the class. The portion used is central, again, I don't know that.

Q Right.

A Amount taken necessary, this one, I would almost have to skip over.

Q You don't have enough information?

A Because I don't have enough information.

Q And the fact -- I take it the fact that it's two chapters is not, in and of itself, determinative one way or the other?

A I would think not, no.

Q Okay.

A Effect on the market, though my background is education, it's not language teaching, so I would not know what the effect might be, so that one would be one that I just couldn't determine. I could see the use stimulating the market for the original work, that a student uses this and realizes that it's so important that they need to have this, that they would go out and buy a copy.

I don't know about products marketed by the copyright holder. I don't know if it's still in print. What is the date of the copyright? '91, so that one -- I would have to determine that, whether it's still in print or whether there's a new edition or something available.

Don't know about licensing or commission, so I would have to find that out. Presumably it is a supplemental classroom reading. Given the nature of the class, as I'm understanding it, there would be the one copy made, so presumably that would argue in favor. Original --

Q Can you explain that, because isn't the intent of this E-Reserve list to make copies potentially available to every -- every student in the course? Isn't that the correct way to interpret that element?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: Not explicitly, no. It's that there is one copy made available in the same way that one copy was made available in a copy environment, except that it's now in an electronic environment. What the student chooses to do with that one copy is what the student chose to do in the paper environment, take notes from it, make a copy of it. It's very analogous to the paper environment.

Q (By Mr. Rich) Let me understand your interpretation. If there are 15 students in a course --

A Uh-huh.

Q -- is there only one copy being made available or 15 copies being made available, as you think about it?

A From an E-Reserve system, it would be one copy.

Q Even though the students are able to make further copies themselves?

A Again, it's analogous to the paper environment where the library makes one copy available and multiple copies can be made by the students.

MR. RICH: Sorry, I was distracted.

If I could just hear the -- that last answer.

(Record read.)

Q (By Mr. Rich) In the library environment, in the hard-copy environment, you would agree with me that that cannot be done, at a minimum, simultaneously by all students, correct?

A To the best of my knowledge, no.

Q And by what techniques would students checking reserve books out in hard copy in a library physically make copies?
A They would check them out and they would take them to a copy machine and they would make a copy.
Q And would they normally pay a fee to do that?
A They would pay 10 cents a page or whatever the cost is.
Q Right. Now, you agree with me that downloading and oftentimes at least printing from electronic reserves is an easier and perhaps more cost-effective way of making a copy than through physical reserves?
A I would say it might be easier. I would not say it's more cost-effective.
Q And the reason for the latter is?
A That when one factors in the cost of the technology and printer cartridges and printing at home and all of that kind of stuff, or at a -- or at the library, that it's not necessarily more cost-effective.
Q Okay, why don't you keep going?
A This is my copy of the book, so I obtained

it lawfully. And I have limited access by putting it on E-Reserve behind a password protection. Again, the effect on market, as I indicated when we looked at it on the weighing in favor, I don't know, because I don't know the discipline well enough.

I don't know whether or not licensing or commission is reasonably available, so that would be one that, if I were actually trying to make a determination and were going through all of this, that might be one that I would pursue further.

Numerous copies are not being made or distributed. I don't know, again, the discipline enough to know about the long-term use. It is not a required classroom reading, and I do own the copy of the book and the Web access is limited.

Q Are you in a position, even with your limited knowledge, to make a fair use judgment?

A Because one factor we left completely undetermined, no.

Q Staying in the fourth factor for a minute --

A Uh-huh.

Q -- are each of those factors within -- are each of those elements within a factor entitled to equal weight?

A Not necessarily, I don't believe.
Q Looking within Factor 4, are there one or more elements that you think deserve more weight compared to others?
A Because, as I've said, I think one of the things that faculty members would be thinking about would be what the impact could be on materials for which they hold the copyright, I would think a faculty member would weigh more the impact or the effect on market or potential market for the copyrighted work.
Q There's no explicit guidance that would require that, however, correct?
A No.
Q So that in theory, if someone was doing this somewhat mechanically --
A Uh-huh.
Q -- you could find -- you could make a judgment that there could be a very significant impairment of the market, yet find a majority of other factors favoring fair use that could lead the faculty member doing the math, as it were, within Factor 4 to say, "I still win Factor 4," that's feasible, correct?
A It's feasible.

Q Do you think that would be a desirable outcome?
A Not if I were the holder of the copyright, no.
Q Let's do one or two more of these. We're not going to belabor this exercise.
A I would think that my answers would be quite similar, to be honest, if I take --
Q I understand that. There's some where you just don't have information, I understand that.
A There's no way I can do those.
Q We appreciate that. Thank you for your patience in doing it.
A Uh-huh.
Q Then if you'd turn the page to the bottom of the second page, the next item we'll mark deal with "The Slave Community, Plantation Life in the Antebellum South," and the excerpt is Chapter 4 called "The Slave Family." It's an Oxford University Press work.
(Discussion off the record.)
MR. RICH: So the -- Chapter 4 will be marked as Plaintiff's 27.
(Exhibit 27 marked for identification.)
MR. RICH: And the work itself -- have

we got that -- is in -- looks like trade paperbound --
THE WITNESS: Uh-huh.
MR. RICH: -- we'll mark as Plaintiff's 28 and offer it to the witness for her perusal, if she would like to see it.
(Discussion off the record.)
THE WITNESS: Same thing, it's not my book, so presumably this is my book?
MR. RICH: Presumably, yes.
THE WITNESS: Okay.
(Discussion off the record.)
MR. SCHAETZEL: How are we numbering now so that it's clear on the record and I have it as well?
THE COURT REPORTER: That book is going to be 26, and this book is going to be 28.
MR. SCHAETZEL: The book is 28.
MR. RICH: The excerpt is 27.
MR. SCHAETZEL: Okay.
Q (By Mr. Rich) Let me ask you preliminarily, just looking at the schedule entry --
A Uh-huh.

Q -- are you familiar with the course offering "African-American Male/Female Relationships"?

A I am not.

Q Do you know what the reference "AAS" is?

A I'm assuming African-American Studies, but I don't know that --

Q Okay.

A -- specifically.

Q Okay. Please, if you would give us your --

A Again, the book is owned by Atlanta-Fulton Public, so not my book, but we'll pretend it is.

Q I believe this is a 42-page excerpt, incidentally.

A Again, going through the Factor 1 --

Q Yes.

A -- nonprofit educational, in this case it looks to be more explicitly for teaching, so I would probably check that one. I would perhaps be less likely at this point to check research and scholarship, less likely to check criticism, transformative for personal study. And again, I don't know the course well enough to know whether the use is necessary to achieve the intended educational purpose.

Looking on the weighs against fair use, it is not a commercial activity, it is not profiting from the use, it does not appear to be entertainment, there does not appear to be a nontransformative use. It does not appear to be for publication or for public distribution. And again, I can't know about the use and how it fits into the intent of the course.

Q Did you say it does not appear to be nontransformative or it does not appear to be transformative?

A Transformative, right.

Q So that --

A That one --

Q -- box would be checked?

A -- would be checked.

Q Okay.

A Yes, yes. Sorry. It is a published work, it is --

Q Let me pause on Factor 1 for a minute, if --

A Okay.

Q -- I may, a couple of questions.

A Uh-huh.

Q If a work is being offered in the classroom

setting by the professor, focusing on the right-side factors --
A Uh-huh.
Q -- will it not almost invariably be the case that it does not involve commercial activity, that the -- there's no profiting from use, that it's not entertainment, that it's not for publication, and it's not for publication distribution, wouldn't you normally say those automatically are ruled out in the classroom environment/teaching offer?
A I would think generally you would, but I think the intent of the fair use checklist is not just for classroom use, it's for fair use of materials.
Q I understand that, but I'm saying as applied to E-Reserve course offerings, what I'm saying --
A Right.
Q -- would generally be the case, would it not?
A Right.
Q And would it also be the case in the class setting that almost invariably it would be nonprofit educational; teaching, if it's in a traditional class setting as opposed to the practicum kind of setting

you indicated; and then, of course, up to the professor to make the judgment, at a minimum, whether the use is necessary or not, correct?

A Though I think -- I think keeping in mind that there are for-profit educational settings. Georgia State University is not one of them, but there are for-profit educational settings.

Q Right. But focusing --

A And I think that --

Q That's a fair comment, but --

A Okay.

Q -- would you think that offering E-Reserves in a for-profit educational setting would entail either commercial activity or profiting from use; is that your understanding?

A It certainly would be -- it would change the way I would have to look at this, yes.

Q Uh-huh. But here in this setting, wouldn't invariably an E-Reserves offering in the classroom setting award Factor 1 to the professor unless the professor said, "While I'm offering this work for my students, it's not really necessary to achieve my purpose"?

MR. SCHAETZEL: Objection as to form.

THE WITNESS: And I do think that

you -- the criticism piece, I think, would be one that would take it over even stronger over onto the -- onto --

MR. RICH: Yeah.

THE WITNESS: -- the side that favors fair use. And I do think that there are ways that -- I think, yes, you're generally right, but I think there are some instances where it would weigh against fair use.

MR. RICH: Okay.

THE WITNESS: I don't think you could automatically say, "Well, I don't need to check this one because it always weighs in my favor."

Q (By Mr. Rich) Now you can proceed, I'm sorry, with Factor 2, 3, 4.

A Here, it would be a published work and presumably a work of nonfiction. Again, I'm not familiar enough with it to know, but I'm making that assumption. Again, the question about important to educational objectives would be up to the faculty to decide.

I -- again, because I don't know, I don't know whether it's highly creative. So, I mean, this one, I would have a little bit of a hard time determining without knowing the discipline and the area a little bit more. The ways it's described on the list, that it was a course, and I could see that you could -- you could be using something that is a work of fiction to illustrate something in a course, and that would change the whole thing, but I just don't know this one well enough to know that.

Q Just stepping back again and looking at Factor 2 --

A Uh-huh.

Q -- is it accurate that on a numerical count basis, in awarding Factor 2 one way or the other, the simple fact that a work is a published factual or nonfiction work will award that factor to a fair use, will it not?

A If it were published factual in a workbook, the answer would be no, to my mind. That would require a judgment call on my part. That's something that is a consumable work, is -- kind of bumps it over --

Q Even though --

A -- and I --

Q -- it would be 2 to 1?

A It would be 2 to 1, and I would have to think about that. Because as a consumable work, it's something that you would presumably be asking students to use, work through, turn in, do something with.

Q And then what degree of confidence do you have that other faculty would process that in a similar way?

A That, again, is kind of a judgment call on my part, but I would have a fairly high level of confidence.

Q And if it's not consumable, though, my proposition would be correct that a --

A Published work of nonfiction.

Q Would avoid that factor in the E-Reserve classroom setting to fair use?

A Generally, yes.

Q Okay.

A Factor 3, again, this is the one that I had so much trouble with the last time, I'm going to have the same trouble with it this time, so I think here it's hard to know how it would come down in terms of one way or the other.

Q And your reaction to 40 pages out of a work of approximately -- without the tables at the back, it looks like it 341 pages -- 343 pages.

A I'm not sure that's terribly relevant.

Q If you were staring at 75 pages, would that become more relevant to you?
A I certainly would think twice about it. I mean, if you -- if you're -- if you are starting to say, you know, you must read the whole book, yes, I mean, if it's -- if it continues to be supplemental material and, you know, it's 75 pages, I might be looking for something else that I could offer for them to use.
Q Okay.
A And again, with Factor 4, I don't know the discipline well enough to know whether this is the only book on the market that's out there that's -- I mean, what the effect would be. Kind of similar answers to what I gave before in terms of not really knowing kind of how it would play out.
Q Can I ask you, in the E-Reserve setting, is the "one or few copies made or distributed" box routinely to be checked under your interpretation?
A I don't know.
Q Can you think of any situation where, as you think about it, more than one copy is being made or distributed?
A I -- I was thinking of another question, so let me say -- I would say that here, in the E-Reserve

setting, it would be one copy.

Q And you don't believe that the copies being available to multiple students in the class is a distribution of more than one copy?

A No.

Q Okay.

A And again, I would draw the analogy to the print environment that one copy is made available. What the student chooses to do with that copy is the student's call.

Q Okay.

MR. RICH: Give me a second, please. Can we go off the record?

THE VIDEOGRAPHER: Off the record at 4:05:55.

(Recess taken.)

(Exhibits 26 and 28 marked for identification.)

THE VIDEOGRAPHER: Back on the record at 4:18:52.

Q (By Mr. Rich) Ms. Seamans, did you maintain any notes of the committee meetings which you participated in relating to the formulation of the new policy?

A No.

Q Is it your normal practice not to do so, or were you -- were you recommended not to do so?

A It's normal practice.

Q Okay.

MR. RICH: I have no further questions.

MR. SCHAETZEL: We have no questions.

THE VIDEOGRAPHER: Off the record at 4:19:19.

(Deposition concluded at 4:19 p.m.)

ERRATA PAGE

Pursuant to Rule 30(e) of the Federal Rules of Civil Procedure and/or Georgia Code Annotated 9-11-30(e), any changes in form or substance which you desire to make to your deposition testimony shall be entered upon the deposition with a statement of the reasons given for making them. To assist you in making any such corrections, please use the form below. If supplemental or additional pages are necessary, please furnish same and attach them to this errata sheet.

I, the undersigned, NANCY SEAMANS, do hereby certify that I have read the foregoing deposition and that, to the best of my knowledge, said deposition is true and accurate with the exception of the following corrections below.

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NANCY SEAMANS

Sworn to and subscribed before me

this ______ day of _____________ 2009.

____

Notary Public

My commission expires ________________

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STATE OF GEORGIA
COBB COUNTY

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Deposition of NANCY SEAMANS

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